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Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure

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INTRODUCTION

Much present-day administrative adjudication takes place in a procedural context which is significantly different from that of the traditional regulatory agency.[1] In agency proceedings ranging

1 In the structure of the traditional regulatory agency, the agency head is the final adjudicating authority. In the alternative agency structure examined here, the agency head does not play that role; rather, adjudication takes place before a tribunal which is practically, if not formally, independent. Administrative law literature has tended to focus upon the traditional regulatory agency structure to the neglect of this alternative structure. *See, e.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 20-25 (1965) (discussing "the multi-powered agency"). Professor Schwartz observes that administrative law-

from administrative enforcement under the Occupational Safety and Health Act to the resolution of claims under the veterans benefits acts, adjudication is conducted by tribunals which are practically and often formally independent of the administering or enforcement authority. Appeals or review functions are performed either by other independent administrative bodies or the courts. In the classic regulatory agencies the opposite was the case. In those agencies, the agency head invariably held the power of final review, a power which was long deemed necessary as a means through which the agency head could control the direction of policy development.

In this Article I examine the rise and development of administrative or regulatory programs that employ independent adjudicating tribunals. In the process, I develop the beginnings of a schema for identifying the types of organizational structure that are most congruent with different administrative and regulatory tasks. Independent adjudication has always performed an important role in government administration, but its structural significance has not been widely understood or appreciated. To the contrary, the structure of the highly visible regulatory agencies has largely shaped thinking about administrative law over the past half century. The peculiar characteristics of an alternative administrative structure involving independent adjudication have not been broadly understood. In this Article, I argue that the traditional agency structure was designed to regulate by formulating policies in the adjudicatory process, and that when policymaking through adjudication becomes impractical or inefficient, the structure of agency organization should, and generally does, change. The direction of this change is towards an organizational design in which the adjudicating tribunal is separate, practically if not always formally, from the policymakers. In the following pages I explore the conditions which induce the use of this alternative framework.

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yers have concentrated their attention on the regulatory agencies because the law is more fully developed there. B. SCHWARTZ, ADMINISTRATIVE LAW § 1.2, at 6, § 1.5, § 1.6. (2d ed. 1984). Although Schwartz points out that the current growth is in the area of social welfare agencies, he nonetheless de-emphasizes the different structural organization of most of the social welfare agencies when he asserts that "the outstanding characteristic of the administrative agency is its possession of legislative and judicial powers." B. SCHWARTZ, *supra*, § 1.6, at 10. *See also* Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 466 (1989) (describing administrative adjudication as taking place in a structure whose attributes are those of the traditional agency structure).

I submit that the practicalities of administration frequently mandate the use of this alternative agency structure: as caseloads become heavier, the classic regulatory design becomes increasingly dysfunctional. A high volume of adjudication alone suffices to impose a practical requirement of independent adjudication. But another circumstance heightens the call for an independent adjudicating tribunal: when an agency is charged with rapid implementation of a comprehensive system of behavioral controls over numerous subjects, the agency must set out detailed behavioral standards in advance. These standards must be sufficiently clear to facilitate their observance. Adjudication is ill-suited for this task of standard-setting.[2] In such circumstances, the classic regulatory structure loses its rationale and the alternative structure better fits the task to be performed.

I further argue that although the alternative agency model separates adjudication from policymaking, the success of the alternative model largely can be attributed to the nature of the caseload to which that model has been applied; in the alternative structure, for reasons which are identified below, the caseload tends to involve very few salient issues of policy. Nevertheless, the success of the alternative structure does not rehabilitate critics of the traditional regulatory agency structure such as Louis Hector, Newton Minow, and the critics of the New Deal period, because they failed to make the connection between the nature and volume of the agency caseload on one hand, and the appropriateness of separating policymaking from adjudication on the other.[3]

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2 It is sometimes possible to develop behavioral standards over time by incrementally building up behavioral norms through adjudication, as the classic regulatory agencies sought to do. But standard-making through adjudication is a slow process and one that invariably leaves many questions open. Moreover, the process is not always successful. Judge Friendly has pointed out telling examples where agencies have failed in the task of developing standards through adjudication. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962). Even when successful, however, the development of standards through adjudication is a ponderous process which promises, at most, sets of broadly open-textured standards, generally limited in their application by the factual findings upon which they are based. This process is not well adapted to establishing comprehensive behavioral controls such as those governing workplace safety, environmental controls on pollutant discharges, and similar regulation.

3 Professor Paul Verkuil, a contemporary student of administrative law and the current President of William and Mary College, has recently examined administrative decisionmaking in forms fitting or approaching this alternative paradigm. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 268-72. In summary form, Verkuil deduces from his examination of the alternative paradigm that prosecutorial powers are not essential to agencies carrying on adjudicatory tasks. For this reason, he rec-

Finally, the alternative model raises the issue of whether it is appropriate for the policy arm of an agency to use management techniques to affect adjudication. This relatively new issue in administrative law is explored in Part VII of this Article.[4]

I. THE STRUCTURAL PARADIGMS

A. The Traditional Regulatory Agency Paradigm

The traditional agency structure is illustrated by the "independent" federal agencies, such as the Federal Trade Commission,[5] the Federal Communications Commission,[6] and the Securities and Exchange Commission,[7] as well as by the present or past administration of a variety of programs by Cabinet Members and other executive officials.[8] These executive officials and agency heads are charged with supervisory authority over their agency's

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ommends generally modifying the organizational approach embodied in the traditional model by assigning enforcement to a separate agency. Verkuil's reason for this change in structure is to enhance the appearance of fairness. As I read Verkuil, the separation he envisions contemplates that the primary responsibility for policymaking would lie with the adjudicatory body, as in the National Labor Relations Board (NLRB).

I believe that a high-volume caseload is a major determinant of the success of an agency organizational structure. As case volume increases, adjudication is increasingly separated from policymaking, because adjudication as a principal policymaking device works best in an agency with a small caseload. Indeed, in agencies experiencing a high-volume caseload, the most practical means for policymaking is rulemaking. In such agencies, therefore, the principal responsibility for policymaking properly lies with a rulemaking authority, which would also bear the primary administrative or enforcement responsibility. The model discussed here, accordingly, is significantly different from the NLRB model envisioned by Verkuil. Verkuil's paper is a significant contribution to the analysis of agency structure and should serve as a complement to the analysis contained in this article.

4 *See infra* notes 147-71 and accompanying text.

5 15 U.S.C. § 41 (1988). The Federal Trade Commission (FTC) perhaps first embodied the attributes of the classic regulatory agency. *See* Federal Trade Commission Act, ch. 311, 38 Stat. 717-24 (1914) (codified as amended at 15 U.S.C. §§ 41-77 (1988)). The Interstate Commerce Commission (ICC) was the first modern regulatory agency and is most often referred to as the prototype of the other independent agencies. *See, e.g.*, B. SCHWARTZ, *supra* note 1, § 1.2 at 6. The ICC as originally established, however, lacked power to set out rules prospectively. *See, e.g.*, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370, 385 (1932). By contrast, the FTC was designed from its inception to create future standards through the course of adjudication.

6 47 U.S.C. § 151 (1988).

7 15 U.S.C. § 78d (1988).

8 *See, e.g.*, the role of the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C. § 193 (1988); the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499f(c), (d), 499g(a) (1988); and the Federal Seed Act, 7 U.S.C. § 1599 (1988); as well as the role of the Secretary of the Treasury under the Federal Alcohol Administration Act, 27 U.S.C. § 204 (1988).

and department's overall activities, and they act as the final adjudicator for the cases which the agency's or department's prosecuting arm has instituted.[9] Historically, adjudication has been the primary means employed for promulgating and implementing agency policies. Adjudications generally involve evidentiary hearings held before administrative law judges, with the power of final review resting with the agency head. Agencies that have employed this structure include those possessing a regulatory mandate to impose new behavioral standards[10] and those responsibile for overseeing regulated industries.[11]

B. The Alternative Agency Paradigm

In the alternative administrative structure examined in this Article, policy is developed through rulemaking, and the rulemaking organ does not participate in adjudication, except as a

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9 As discussed *infra*, text following note 92, time constraints impede busy officials from properly exercising adjudicative power vested in them. Accordingly, various techniques have been devised to lessen or eliminate the burden which these adjudicative responsibilities would otherwise impose. A number of independent agencies have delegated substantial adjudicative responsibilities to intermediate review boards. *See infra* notes 82-83 and accompanying text. Also, some Cabinet Officers have delegated adjudicating power to Judicial Officers. *See* 39 U.S.C. § 204 (1988) (Postmaster General's power to delegate judicial functions to Judicial Officer); 7 C.F.R. § 2.35 (1990) (Agriculture Secretary's delegation of judicial functions to Judicial Officer). Dean Ronald Cass has examined the uses of independent review boards, discretionary agency review and other devices for improving decisionmaking efficiency, consistent with furthering the policies of the agency head. Cass, *Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1 (1986). In his study, Cass discusses incidents in which delegation of decisionmaking authority by the agency head produced policy decisions which that head found unacceptable. *Id.* at 33-35. *See* Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986).

10 Examples of traditionally structured agencies created to impose new behavioral standards include, inter alia, the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC). The FTC was created in 1914 to develop standards for evaluating "unfair methods of competition" prohibited by § 5 of its enabling statute. Federal Trade Commission Act, ch. 311, §§ 1, 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. §§ 41, 45 (1988)). The SEC was created during the reforms of the New Deal period to administer and enforce disclosure requirements pertaining to securities issuers and dealers. Securities and Exchange Act of 1934, ch. 404, § 4, 48 Stat. 885 (1934) (codified as amended at 15 U.S.C. § 78d (1988)).

11 The Federal Communications Commission oversees the operations of the radio and television industries, largely through the issuance of broadcasting licenses. 47 U.S.C. §§ 151, 301, 307 (1988). Prior to the extensive deregulation of transportation which occurred in the late 1970s and early 1980s, the Civil Aeronautics Board regulated air transportation and the Interstate Commerce Commission regulated rail and motor transport. *See* Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 302-305 (1983).

party. If the agency is administering a regulatory program, that same agency institutes enforcement proceedings against private parties who fail to comply with its policies. Or, if the program involves the distribution of benefits, the agency supervises the administration of the program, inter alia, by issuing rules when required. These agencies differ from the traditional regulatory agency because the agency head does not control the outcome of particular adjudications. As I argue below, it is primarily the administrative tasks assigned to these agencies which account for their unique structure. When these tasks raise numerous policy issues, the resolution of each of which would have widespread applications, then the alternative structure is optimal. A conscious attempt to enhance the appearance of adjudicative fairness, however, sometimes plays a role in the use of this organizational form.[12]

Agency decisionmaking structures of this alternative type can be found both in state and federal regulatory and benefit systems. New York, for example, provides that the decision of the Industrial Commissioner administering the unemployment insurance laws is subject to review by an administrative law judge whose decision is, in turn, reviewed by an Unemployment Insurance Appeal Board with further review in the courts.[13] In Minnesota, a probable cause decision of the State Division of Human Rights must be proved in a hearing presided over by an administrative law judge.[14] Further review is in the courts. On the federal level, the

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12 *See, e.g.*, S. REP. NO. 181, 95th Cong., 1st Sess. 47 (1977) *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 3401 (Federal Mine Safety and Health Amendments Act of 1977). *See* Verkuil, *supra* note 3 at 268. Fairness considerations were the basis upon which the Equal Employment Opportunities Commission (EEOC) was denied adjudicatory powers in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e and 5 U.S.C. § 5108, 5314-16 (1988)). 118 CONG. REC. 3976-79 (1972). The initial version (H.R. 1746) of that Act would have vested adjudicatory power in the EEOC. The EEOC is empowered to investigate charges filed with it and to seek conciliation. If conciliation fails, the EEOC is authorized to bring suit. 42 U.S.C. § 2000e-5 (1988).

13 N.Y. LABOR LAW §§ 534, 535, 620-21, 623, 624 (McKinney 1988) (Unemployment Insurance Appeal Board). A similar procedure is provided in N.Y. LABOR LAW §§ 100, 101, 102 (McKinney 1988), authorizing the Industrial Board of Appeals to review rules, regulations, and orders of the Commissioner of Labor.

14 MINN. STAT. § 363.071(2) (Supp. 1991). Minnesota has experienced difficulty in deciding whether an enforcement agency may appeal the adverse decision of an administrative law judge or hearing officer. *See, e.g.*, Minnesota State Bd. of Health v. Governor's Certificate of Need Appeal Bd., 304 Minn. 209, 230 N.W.2d 176 (1975). Special legislation was needed to enable such appeals under that state's human rights law. *See* Minnesota Dep't of Highways v. Minnesota Dep't of Human Rights, 308 Minn. 158, 241

administration of OSHA,[15] the Federal Mine Safety and Health Act,[16] the Social Security disability program,[17] the Veterans Administration,[18] and the adjudicatory role of the National Transportation Safety Board[19] over the certificate suspension and revocation orders of the Secretary of Transportation[20] are examples of similar nontraditional administrative structures.

To characterize a type of agency organization according to its lack of adjudicatory control initially may appear to be overbroad because such a characterization fits any purely executive department whose tasks include bringing enforcement actions in the courts. Furthermore, the type of agency that I examine in this Article is one in which adjudication takes place within the administrative process, albeit not before the agency charged with program administration. As the discussion below will show, however, the differences between an executive department exercising enforcement functions by instituting actions in the courts and an agency which brings enforcement actions before an independent or quasi-independent administrative tribunal become less noticeable as the executive department takes on the task of enforcing a large-scale regulatory program of a specialized nature. In the latter case, because the purely-enforcement agency—like any agency (including the traditional regulatory agencies)—is formulating a coherent set of policies governing a narrow field, it begins to resemble an acknowledged regulatory agency.

The classic example of a regulatory program enforced in the courts is the federal minimum-wage program established by the Federal Labor Standards Act.[21] The Federal Labor Standards Act

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N.W.2d 310, 314-315 (1976). Under legislation codified at MINN. STAT. § 363.072 (1990), the Department of Human Rights may now appeal an adverse decision of an administrative law judge.

15 *See* 29 U.S.C. § 659-60 (1988); *infra* notes 104-15.

16 *See* 30 U.S.C. §§ 801-962 (1988).

17 *See infra* notes 125-31 and accompanying text.

18 *See infra* notes 116-24 and accompanying text.

19 49 U.S.C. app. § 1902 (1988).

20 Suspensions, amendments, modifications, revocations, and denials of operating certificates and licenses by the Secretary of the Treasury under the Federal Aviation Act, the revocation of aircraft registration, and decisions of the Commandant of the Coast Guard revoking, suspending, or denying licenses, certificates, documents, or registration are reviewable by the National Transportation Safety Board under 49 U.S.C. app. § 1903(a)(9) (1988), an independent agency whose members are appointed by the President and confirmed by the Senate. 49 U.S.C. app. § 1902(b) (1988).

21 29 U.S.C. §§ 201-19 (1988). The primary substantive provisions are contained in §§ 206, 207.

is enforced primarily by civil actions instituted by the Department of Labor. Early in the enforcement history of that Act, the Department recognized the need to promulgate guidelines or rules to aid the development of the Act and obtain compliance from employers. The U.S. Supreme Court supported the Department's attempt to develop a coherent approach to enforcement when, in *Skidmore v. Swift & Co.*,[22] the Court held that the judiciary could—and normally should—look to the Department's guidelines and rules for assistance in reaching their decisions. While the Court explicitly stated that the deference owed to the Administrator in any particular case depended upon the persuasiveness of the Administrator's reasoning, the Court also emphasized that the Administrator's experience and information were generally broader than those of judges upon minimum-wage issues.[23] Thus, the Court strongly, albeit implicitly, directed the lower courts to give controlling effect to the Administrator's policies. Moreover, this directive was reinforced in the Court's explicit statement that enforcement and judicial standards ought to be similar.[24] Indeed, *Skidmore* is a pre-Administrative Procedure Act authority in which the Court explicitly recognized the programmatic responsibilities of agencies which formally lack adjudicatory powers. It is the occasional failure of the courts to give full effect to these programmatic responsibilities which has given rise to a number of contemporary administrative law issues.

Some agencies possess power to develop policy by rule but lack an adjudicative role. In this respect they resemble the Administrator of the Federal Labor Standards Act. Unlike the circumstance encountered in *Skidmore*, however, the adjudicative responsibility for the programs administered by these agencies is located within the administrative process, although outside of the policy-making agency. In these programs, the agency brings an enforcement action before an administrative law judge or other

22 323 U.S. 134 (1944).

23 *Id.* at 139-140.

24 *Id.* at 140. In other cases the Court demanded deference to the decisions of adjudicating agencies as to how broadly worded enabling act provisions apply to particular sets of facts. *E.g.*, Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946); NLRB v. Hearst Publications, 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941). The demand of judicial deference was consistent with the acknowledged program responsibilities of those agencies. The deference required in *Skidmore* thus implicitly acknowledged the program responsibilities of a non-adjudicating agency. In recent years the Court has demanded deference to the interpretations of all administering agencies. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

hearing panel, whose decisions are not subject to review by the head of the agency which instituted the enforcement action. Sometimes, as under the Federal Occupational Safety and Health Act[25] or the Federal Mine Safety and Health Act,[26] an administrative law judge's decisions are subject to further administrative review, but not by the same agency organization which has brought suit. Some benefit agencies are structured in a similar way: the agency charged with primary responsibility for administering a benefit program may not itself adjudicate; the adjudicating role may be placed in officials such as administrative law judges or review boards which are, to a significant degree, independent of the administering agency.[27]

The decisionmaking apparatus employed by the Social Security Administration (SSA) in old-age, survivors, disability and health insurance programs includes a system of administrative appeals which culminates in adjudication before an administrative law judge with discretionary review by an Appeals Council.[28] Judicial review is then available in the federal district courts.[29] The SSA structure is similar to the OSHA model at the level of administrative adjudication, in that both systems employ administrative law judges whose decisions are reviewed by an administrative tribunal with further review in the courts. The SSA attempts to exert control over a vast decisional system which employs substantially more administrative law judges than any other agency. In that system, substantial conflict has developed in recent years over the relations between the agency and the administrative law judges.[30] In the OSHA system, a latent conflict between the Secretary of

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25 *See* 29 U.S.C. § 661(j) (1988).

26 *See* 30 U.S.C. § 823(d) (1988).

27 *See* the descriptions of the administration of welfare benefits, *supra* notes 73-79 and accompanying text, and the disability insurance program of the Social Security Administration, *supra* notes 125-31 and accompanying text.

28 *See* 20 C.F.R. §§ 404.929, 404.967 (1990). An extensive discussion of the role of the Appeals Council can be found in Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U.L. REV. 199 (1990).

29 42 U.S.C. §§ 405(g), 421(d) (1988).

30 *See, e.g.*, D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986), *dismissed as moot*, 679 F. Supp. 596 (W.D. Va. 1987); Goodman v. Svahn, 614 F. Supp. 726 (D.D.C. 1985); Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984); Chocallo v. Bureau of Hearings & Appeals, SSA, 548 F. Supp. 1349 (E.D. Pa. 1982); J. MASHAW, BUREAUCRATIC JUSTICE (1983); Gifford, *Review Essay, Need Like Cases be Decided Alike? Mashaw's Bureaucratic Justice*, 1983 AM. B. FOUND. RES. J. 985.

Labor and the Occupational Safety and Health Review Commission underlies actual disputes about the deference which the judiciary owes to the competing interpretations of agency regulations by the Secretary and the Commission.

C. The Relationship Between Adjudication and the Agency in Nontraditional Agency Structures

It is the agency head's lack of control over the outcome of particular adjudications in the nontraditional structure which constitutes the critical difference between that structure and the traditional one. This difference has given rise to the issues permeating the administration of the Social Security Disability Program and the less intense disputes in OSHA administration.

The issues being pressed today are new ones. In controversies involving the Social Security Administration, they are being pressed as issues of administrative law judge "independence." In disputes involving the Occupational Safety and Health Act, they are being pressed under the competing rubrics of judicial deference to agency policymaking under *Chevron,*[31] and a decisional independence appropriate to statutorily established reviewing agencies. Yet, today's issues are linked to older debates about the relationship between agency heads and administrative law judges (and the hearing officers who were their predecessors) in the traditional agency structure.

In examining these contemporary controversies, therefore, it is appropriate to review and reconsider the role of an agency head in the administration of that agency's enabling statute, and the relation of an agency head to that agency's administrative law judges or hearing officers. As shown below,[32] professional concern about the proper relationship between agency heads and administrative law judges has continued since well before World War II. That concern was a major focus of the Final Report of the Attorney General's Committee on Administrative Procedure, which was issued in 1941.[33] An informed approach to today's disputes, therefore, requires reference to these earlier debates about the relationship between agencies and adjudicating officers

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31 Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

32 *See infra* note 61 and preceding text.

33 S. Doc. No. 8, 77th Cong., 1st Sess. (1941) *reprinted as* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) *and also as* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES (1941) [hereinafter FINAL REPORT].

and to the historical settings in which they took place.

II. POLICY AND FACT FINDING IN THE TRADITIONAL AGENCY: THE EVOLUTION OF THE CONCEPT OF ADMINISTRATIVE LAW JUDGE "INDEPENDENCE"

A. The Adjudicatory Framework of the Attorney General's Committee

In its Final Report, the Attorney General's Committee articulated its view of how the decisional process should proceed within the basic structure of the traditional regulatory agencies. At the same time, the Committee provided a careful rationale for that structure and defined the relationship between the agency head and the agency's hearing examiners. In the Committee's view, administrative adjudication involved two principal components: decision at an evidentiary hearing by a hearing examiner (the precursor of today's administrative law judge[34]) who was structurally insulated from the agency which that examiner served; and agency control over policy, exercised largely through the agency's own review of hearing examiner decisions. The Committee's analysis of the then-controversial combination-of-functions issues[35] was premised upon that framework. Both the framework and the Committee's responses to combination-of-functions issues were subsequently incorporated into the Federal Administrative Procedure Act.[36]

The adjudicatory framework employed by the Committee in its analysis of administrative procedure does not fit the nontraditional agency models described in this article; in the nontraditional models, the administering agencies do not themselves adjudicate. Nevertheless, the Committee's analysis of the relationship between an agency head and the agency's adjudicating officers provides an extremely useful background for a new examination of the role of adjudication in these increasingly familiar nontraditional models.[37]

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34 In 1978, Congress changed the title of hearing officers to administrative law judges. Pub. L. No. 95-251, 92 Stat. 183 (1978). In so doing, the Congress ratified the change of title carried out by Civil Service Commission regulation in 1972. *See* B. SCHWARTZ, *supra* note 1 at § 6.12.

35 FINAL REPORT, *supra* note 33, at 55-60. *See infra* notes 39-41 and accompanying text.

36 *See infra* notes 42-48 and accompanying text.

37 This reexamination is necessary, not to cast doubt upon the Committee's thoughtful conclusions about the operations of traditionally structured agencies, but rath-

B. The Context of the Committee's Recommendations on Hearing Officer "Independence"

Students of regulatory history will recall that in the late 1930s the system of administrative regulation, as then practiced, had come under heavy and widespread attack.[38] Many of the critics were political conservatives who were attacking the extensive regulatory programs of the New Deal. But the critics included many others, who were not so conservative in political outlook but shared with the conservatives a genuine concern that administrative adjudicatory proceedings often were, or appeared to be, inherently unfair. In the view of these critics, an agency like the Federal Trade Commission or the National Labor Relations Board (as it then was structured) both instituted a proceeding against a respondent and later sat in judgment in that very same case. In form, the agency was both prosecutor and judge, a double role which appeared unfair to superficial observers.[39]

The Committee's responses to these criticisms were a defense of the traditionally structured agency. Those responses formed the basis for the design of the Administrative Procedure Act a few years later and, since that time, have constituted a major component of administrative law doctrine.

The Committee conceded that the exercise of prosecutorial and investigative powers was generally incompatible with the exercise, by the same individual, of judicial powers. The Committee believed, however, that the commingling of these incompatible functions could be minimized through internal separation within the agency; the Committee recommended that the individuals who perform the judicial function in the first instance (hearing officers), could—and should—be carefully insulated from the prosecutorial, investigative, and policymaking functions. By thus making the initial fact-finder independent, both in reality and in appear-

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er to assist today's legal profession to understand and to evaluate the operation of nontraditionally-structured agencies and to draw conclusions about the proper relationships inter se of their component parts.

38 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 478-479 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33, 37-41 (1950); Gellhorn & Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 340-342, 385-388 (1939). *See also* R. Pound, *Report of the Special Committee on Administrative Law*, 63 ABA REP. 331, 346-351 (1938).

39 The classic statement on the unfairness of such a double role was made in Bonham's Case, 8 Coke's Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610).

ance, the legitimacy of administrative adjudications would be strengthened. In addition, the Committee believed that hearing officers' independence from agency influence should be fostered by raising their status (through a substantial salary increase) and freeing them from agency control over tenure, promotion and salary determinations.[40]

The Committee accepted a limited commingling of prosecutorial and judicial functions at the level of the agency heads, however, because of the way the Committee understood the adjudicatory process and the role of adjudication in regulation. The largely unstated premise of the Committee's analysis was that adjudication is an agency's principal method of formulating policies and exercising control under its enabling statute.[41] Because policies were formulated and announced in the course of adjudicating, there was no question that the agency heads must participate in adjudication. The only real question posed by the critics, the Committee believed, was whether the agency heads could also participate in complaint-issuance decisions. The Committee was able to give a positive answer to that question on the ground that participation in complaint-issuance decisions was critical to the policy-formulating role of the agency heads: they have to participate in complaint-issuance decisions in order to bring before the agency those cases which raise important policy issues.

The Committee concluded that this necessary participation by the agency heads in complaint-issuance decisions did not seriously compromise the fairness of administrative adjudication: such participation did not prejudice the agency heads' ability to judge the facts, because passing on complaints did not require them to evaluate evidence. Moreover, under the two-tier structure of adjudication outlined in the Final Report, the determination of the evidentiary facts would be made in the first instance by independent hearing officers, and the agency heads would judge only at the second stage, when the dispute was focused on policy issues rath-

40 FINAL REPORT, *supra* note 33, at 46.

41 The Committee thought that agencies (such as the ICC, the CAB and the SEC) which performed rulemaking and supervisory functions should also adjudicate in order to further overall consistency between the supervisory functions and adjudication. Enforcement-oriented agencies (such as the FTC and the NLRB) should adjudicate in order to avoid policy conflicts between the administrative units which issued complaints and the units which adjudicated them. Coordination of enforcement and adjudicatory policies would ensure that parties were not subjected to needless administrative litigation. FINAL REPORT, *supra* note 33, at 57-58.

er than issues of evidentiary fact.

III. THE FEDERAL ADMINISTRATIVE PROCEDURE ACT: EVIDENTIARY HEARINGS AND POLICY FORMULATION

When Congress enacted the Federal Administrative Procedure Act in 1946,[42] it relied heavily upon the study carried out by the Attorney General's Committee. Indeed, the Act was drafted to fit the decisionmaking paradigm which was the focus of the Final Report: a model in which a hearing officer independently decides factual questions, and the agency head sits in review in order to control policy.

The Administrative Procedure Act followed the recommendations of the Attorney General's Committee to raise the status of hearing officers and to insulate them from agency control.[43] Under the Act, the Civil Service Commission (now the Merit Systems Protection Board[44]) acted as a barrier between the agencies and their hearing officers. Agencies were prohibited from removing hearing officers except for good cause established and determined by the Civil Service Commission on the basis of an on-the-record hearing, and hearing officers' compensation was to be prescribed by the Civil Service Commission independently of agency recommendations or ratings.[45]

The Federal Administrative Procedure Act contemplated that a hearing officer would preside over evidentiary hearings and incorporated a variety of provisions designed to protect the integrity of the fact-finding process at the hearing-officer level. The Act, however, carefully avoided slavish imitation of judicial structures by imposing judicial-like isolation upon hearing officers only in license-revocation and other more "accusatory" proceedings and by providing a set of more liberal procedural rules for economic regulatory decisions.[46]

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42 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

43 *See* Scalia, *The ALJ Fiasco–A Reprise*, 47 U. CHI. L. REV. 57 (1979).

44 The Merit Systems Protection Board has succeeded to the adjudicatory functions of the Civil Service Commission. *See* 5 U.S.C. §§ 1201-09, 7521 (1988); Reorganization Plan No. 2 of 1978 §§ 201-02, 3 C.F.R. 323, 325-26 (1979), *reprinted in* 5 U.S.C. app. 1369-70 (1988), *and in* 92 Stat. 3783 (1978). The examining functions previously performed by that Commission are now performed by the Office of Personnel Management. *See* 5 U.S.C. §§ 1101-05 (1988); Reorganization Plan No. 2, *supra*.

45 Administrative Procedure Act of 1946, § 11 (now incorporated in relevant part in 5 U.S.C. §§ 3105, 7521, 5372 (1988)).

46 The Administrative Procedure Act incorporated several features designed to pro-

The hearing officer's decision was subject to review by the official, board, or commission which constituted the head of the agency. Consistent with the understanding of the Attorney General's Committee, the reason for agency-head review of hearing-officer decisions was not primarily to correct "factual" mistakes of the hearing officers, but to maintain control over policy development and application. This role of the agency head as the final adjudicating authority is recognized throughout the Act. Indeed, the Act defines the scope of the agency's authority on review of a hearing officer decision as coincident with the authority which it would have to decide the case in the first instance.[47] That the drafters of the Act believed that the agency head could exercise policy control largely through reviewing hearing-officer decisions reveals unstated assumptions about the traditional regulatory model: policy control can be maintained through the adjudicatory process only where the caseload coming before the agency head is relatively light[48] and where the majority of the cases adjudicated

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tect the independence and integrity of hearing-officer decisions. In on-the-record proceedings defined as "adjudications," it insulated the hearing officers from persons performing investigative or prosecutorial roles in the same or related cases, and it insulated hearing officers from all communications on factual issues. 5 U.S.C. § 554(d) (1988). *See* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 762-764 (1981). The Act was carefully crafted, however, to allow hearing officers to consult with experts in complex technical proceedings. Ratemaking and most other economic regulatory proceedings were exempted from the Act's provisions restricting hearing officers from consulting, either because the proceedings were defined as rulemaking and thus exempted from the § 554(d) provisions (which governed only adjudications) or because they fell within the explicit exemptions from § 554(d) contained in clauses (A) and (B) of that provision. Thus, without explicitly saying so, the Act incorporated a dichotomy between "accusatory" proceedings, such as license revocations, which often involve credibility determinations and an assessment of blame, and technical, complex economic regulatory proceedings. While the hearing officer in the former type of case is insulated like a judge, the hearing officer is not so insulated in the latter, more complex type of case. *See* Jaffe, *Basic Issues: An Analysis in Symposium–Hoover Commission and Task Force Reports on Legal Services and Procedures*, 30 N.Y.U. L. REV. 1273, 1281 (1955); Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 VAND. L. REV. 777, 851-852 (1967).

47 5 U.S.C. § 557(b) (1988) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.")

48 The number of cases which actually must be decided by the agency head is always substantially less than the initial number of potential disputes. Some figures for the NLRB are illustrative. Although the NLRB has not fit the model of the traditional regulatory agency since its restructuring in 1947, *see infra* notes 67-69 and accompanying text, it nonetheless continues the practice of making policy in adjudications. In fiscal 1987, 32,043 unfair labor practice charges were filed with regional directors, but only 3,252 complaints were actually issued. These resulted in 767 contested unfair labor practice decisions ultimately handed down by the NLRB in that year. NLRB ANN. REP. 6, 7, 9

by the agency head raise significant fact-specific policy issues.

IV. THE MEANING OF THIS HISTORY

Administrative law reform on the federal level has centered upon traditionally structured agencies. That traditional decisionmaking structure has also been a significant force shaping the course of state administrative law reform.[49] Despite their central focus on traditional agency models, those reforms are relevant to current issues surrounding nontraditionally structured agencies.

The history of administrative law reform on both the federal and state levels reflects universal agreement that administrative law judges must find the evidentiary facts on the basis of their own conscientious review of the record, independent from any agency control or influence. Neither the federal nor the state acts, however, isolate administrative law judges in a vacuum. In complex cases, the federal act allows significant off-the-record input from agency experts on background and expert advice.[50] By con-

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(1987).

A traditionally structured agency becomes dysfunctional when the volume of cases at the level of agency review is larger than the agency head can handle. Agencies attempt to cope with this challenge by narrowing the caseload coming before the agency head: settling most cases through negotiation and eliminating all but discretionary review by the agency head, sometimes with the substitution of review boards as the ordinary final reviewing authority. Nevertheless, the underlying rationale for the traditional structure is eroded when, because of sheer volume, policy implementation becomes more effective when undertaken through rulemaking.

49 The National Conference of Commissioners on Uniform Laws promulgated model state administrative procedure acts in 1946, 1961, and 1981. The traditional paradigm underlay the attempts in the 1961 Act to protect respondents from ex parte input of the agency staff to the agency head. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (MSAPA) § 9(e)(7), § 10(4) (1961), 15 U.L.A. 208, 238 (1990). It was the attempted imposition of these provisions of the 1961 act which effectively delayed the enactment of the New York State Administrative Procedure Act for many years. *See* Gifford, *The New York Administrative Procedure Act: Some Reflections Upon its Structure and Legislative History*, 26 BUFFALO L. REV. 589 (1977). The 1981 MSAPA is markedly more sophisticated than its predecessors. MSAPA (1981), 15 U.L.A. 1-136 (1990). The principal drafters of that act were Professor Arthur Bonfield and Professor L. Harold Levinson. Professor Bonfield had previously advised on the drafting of the Iowa administrative procedure act which itself marked a major advance in state administrative law reform. *See* A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING (1986); Bonfield, *Rule Making Under the 1981 Model State Administrative Procedure Act: An Opportunity Well Used*, 35 ADMIN. L. REV. 77 (1983); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731 (1975). *See also* Auerbach, *Bonfield on State Administrative Rulemaking: A Critique*, 71 MINN. L. REV. 543 (1987). Even the 1981 MSAPA, however, assumes at times that rulemaking and adjudicatory power inhere in the same agency. MSAPA §§ 2-104(3), (4) (1981), 15 U.L.A. 29 (1990).

50 *See supra* note 46.

struction, the model acts do so as well.[51] Federal and state administrative law history shows a prevailing belief that administrative law judge determinations of credibility will generally be respected. Indeed, the courts will often force agencies to respect those administrative law judge determinations.[52] Conversely, administrative law judge decisions are fully open to agency revision on policy, an area where the agency has the last word.[53]

V. ALTERNATIVE AGENCY STRUCTURES: THEIR ROOTS AND EVOLUTION

Alternative agency structures, in which the agency head does not sit as the final adjudicating authority, are not a new phenomenon in either concept or practice. In both respects, however, these structures have a somewhat tangled history. The conceptual history of these alternative structures extends at least back to the rejection of such a structure by the Attorney General's Committee. But, because the Committee focused on agencies which had made policy through the adjudication of a modest number of individually salient cases, the relevance of this rejection to the legitimacy of alternative structures today is questionable. The Attorney General's Committee correctly assumed that policymaking could not be effectively separated from adjudication for the type of agency workload upon which the Committee had directed its focus. By contrast, the paradigm case for complete separation is an agency which handles an extremely large caseload and can control policy most effectively through rulemaking.

In practice, some adjudication has been divorced from policymaking for decades. One of the better known examples is The Board of Tax Appeals—the predecessor of the present Tax Court (an Article I Court)—which was established as an "independent" agency "in the executive branch" in 1924.[54] Adjudication

51 *See, e.g.*, Gifford, *supra* note 46 at 847-858.

52 *See, e.g.*, NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir.), *on remand from* Universal Camera Corp v. NLRB, 340 U.S. 474 (1951).

53 For example, see Judge Frank's classic description of the agency role. *Id.* at 432 (Frank, J., concurring).

54 Revenue Act of 1924, 43 Stat. 253, 336-338 (1924). That aspect of the legislation which located the Board of Tax Appeals "in" the executive branch has come to be viewed with increasing scholarly and judicial skepticism. Professor Strauss doubts whether it is meaningful to "locate" agencies within a particular branch. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-79 (1984). Justice Scalia has expressed the view that Congress' mere say so cannot "locate" an agency within any particular Constitutional Branch. Mistretta v. United

involving disputes between contractors and the government similarly has been conducted by boards of contract appeals for many years, and even before they were recognized by statute under the Contracts Dispute Act, those boards had evolved over time to assume an independence in fact.[55] Welfare administration has generally involved independent adjudication.

The history of independent adjudication, however, is obscured by the fact that in some agencies, the agency head retains formal control over adjudicating bodies whose names suggest independence, while in other agencies, agency heads who historically have possessed power over the adjudicatory process have gradually relinquished that control. The Board of Patent Appeals and Interferences and the Trademark Trial and Appeal Board are examples of the first type. The Commissioner of Patents and Trademarks designates the panels of the Board of Patent Appeals and Interferences who hear appeals from decisions of patent examiners[56] and the Commissioner designates the panels of the Trademark Trial and Appeal Board which hear cases involving trademark interferences.[57]

By contrast, adjudication of veterans' benefit claims illustrates evolution over time from agency head control over adjudication to the present system, where the agency head no longer possesses even formal control over the adjudicatory process. The adjudication of veterans benefits studied by the Attorney General's Committee took place in a setting within the Veterans Administration and was at least formally controlled by the Administrator. Yet, as is described more fully below,[58] the Board of Veterans Appeals which heard administrative appeals at the time of the Attorney

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States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). The present tax court was established as an Article I court by The Tax Reform Act of 1969. Pub. L. No. 91-172, § 951-62, 83 Stat. 730-36 (1969) (codified as amended at I.R.C. §§ 7441-48 (1988)).

55 The Contract Disputes Act of 1978, codified at 41 U.S.C §§ 601-13 (1988), provided statutory authority for boards of contract appeals. Such boards date from World War I when they were established by the War and Navy Departments to relieve the Department Secretaries of the burden of hearing contract appeals. They were reestablished during World War II. *See* Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39, 44-56 (1964). Although these boards of contract appeals were initially established as aids to the Department Secretaries, they now decide cases independently from the Secretaries. *Id.*, at 55-56. *See generally* S&E Contractors, Inc. v. United States, 406 U.S. 1, 17 (1972).

56 35 U.S.C. § 7 (1988).

57 15 U.S.C. § 1067 (1988).

58 *See infra* note 119 and accompanying text.

General's Committee later became a statutorily established body, albeit within the Veterans Administration (now the Department of Veterans' Affairs).[59] More recently the decisions of that body have become reviewable by a newly established and formally independent Article I Court of Veterans' Appeals.[60]

A. Critics in the New Deal Period

The early critics of the traditional agency structure were motivated by conceptions of fairness rather than by the practicalities of administration. In the 1930s and 1940s, these critics argued for complete separation of enforcement and adjudication. Their position was first rejected by the majority of the Attorney General's Committee and was finally rejected by Congress when it enacted the Administrative Procedure Act. That their position was (and is) untenable for regulatory agencies which make policy by adjudication is widely recognized and is demonstrated below. The weakness of the critics' position, however, has not forestalled periodic repetition of their demands for complete separation of functions in agencies which still work primarily through the adjudicatory process.[61]

B. The Hector and Minow Proposals

During the late 1950s and 1960s, Louis Hector and Newton Minow renewed the arguments for separating adjudication from other agency functions. Hector, upon resigning from his seat on the Civil Aeronautics Board, submitted a lengthy memorandum to President Eisenhower in which he argued that adjudication was a poor format for developing policies.[62] Hector argued that policies ought to be developed through rulemaking and that a separate adjudicatory body should ensure that the rules were applied in a nondiscriminatory and predictable manner. The need of the policy-making agency to communicate policies to an independent adjudicating body in advance would force the policymaking agency to draft those policies with precision and coherence. As a re-

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59 38 U.S.C. § 4001 (1988).

60 38 U.S.C. §§ 4051-52 (1988). *See infra* notes 120-21 and accompanying text.

61 For a superb contemporary review of the fairness issues raised by agency structural designs, see Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

62 Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 945, 962-964 (1960).

sult, those subject to agency regulation would also learn of new policies ahead of time and be able to plan their conduct accordingly. Newton Minow, resigning as Chairman of the Federal Communications Commission, made a similar argument for a restructuring of his agency in a letter to President Kennedy.[63] Hector and Minow, however, were vulnerable to the responses of their own critics who (echoing the analysis of the Attorney General's Committee) pointed out that it was impractical to separate adjudicatory decisionmaking institutionally from policymaking where the results of individual adjudications produced major policy impacts. As Carl Auerbach argued in response to the Hector memorandum, under a system of regulated air service, the selection of an airline route is often inseparable from the determination of which carrier will carry the traffic on the route.[64] An attempt to allocate the latter type of decisionmaking to an independent adjudicatory tribunal necessarily involves the tribunal in policymaking. Thus, complete separation of enforcement and adjudicatory functions in agencies which make policy by adjudication is structurally incapable of vesting control of policy in the enforcement branch. Conversely, the adjudicating branch is also impeded from controlling policy in such an agency, because the enforcement branch chooses the cases to be brought before it. This impediment is mitigated to some extent, however, when private parties may bring cases directly to the adjudicating branch, as they often can in agencies administering benefit programs.[65] The critics of Hector and Minow, therefore, were surely correct: the objections to formal separation considered and endorsed by the Attorney General's Committee applied to the Hector and Minow proposals.[66]

C. The Special Case of the Labor Board

One year after the enactment of the Federal Administrative Procedure Act, Congress enacted the Taft-Hartley Act.[67] In the

63 Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146 (1963).

64 Auerbach, *Some Thoughts On the Hector Memorandum*, 1960 WIS. L. REV. 183, 186, 195.

65 *See infra* notes 78-79, 127-31 and accompanying text.

66 *See supra* notes 38-41 and accompanying text.

67 Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1988)).

latter Act, the function of selecting and prosecuting complaints before the National Labor Relations Board was taken away from the Board's supervisory control and lodged in the General Counsel, an official who was provided statutory guarantees of independence from the Board. The Act provided for the General Counsel's appointment by the President and confirmation by the Senate for a fixed term,[68] thus providing him with the same status and tenure as the Act gave to Members of the Board.

The institutional surgery thus imposed upon the Labor Board separated adjudication from enforcement. It did so, however, in a unique way: responsibility for policy was left in the Board, the adjudicating tribunal,[69] rather than in the enforcement unit headed by the General Counsel. The Labor Board structure, accordingly, did not follow the organizational design urged by Hector, Minow or the other principal critics of the traditional regulatory-agency model. Although the Labor Board shares with the organizational model under review in this Article (which I often refer to as a "nontraditional" or "alternative" agency structure) the characteristic that adjudication is separated from enforcement, the resemblance goes no further. Indeed, for two critical reasons, the Labor Board is not, and cannot be, a model for the alternative structure under review here. First, the Board itself bears re-

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68 Pub. L. No. 80-101, § 3(d), 61 Stat. 139 (1947) (codified as amended at 29 U.S.C. § 153(d) (1988)).

69 In removing the selection of cases from the Board's control, Congress adopted a different adjudicatory model from the one which had been employed by the Attorney General's Committee in its Final Report. Contrary to that Committee's views, FINAL REPORT, *supra* note 33 at 58-59, the premise underlying the Taft-Hartley Act was that the selection and prosecution of cases was not a necessary incident to policy-making through adjudication.

The structural change, however, may have been appropriate to the new context in which the Board operated. By the time the Taft-Hartley Act was adopted, caselaw had clarified much of the original openness of the National Labor Relations Act. The substantive provisions of the Taft-Hartley Act further clarified the respective rights of labor and management. Indeed, the Taft-Hartley Act added a new set of behavioral prohibitions directed against labor unions to the set of prohibitions which the National Labor Relations Act had previously imposed upon management. *E.g.*, 29 U.S.C. § 158(b) (1988). The thrust of the Taft-Hartley Amendments was thus fundamentally different from that of the original Wagner Act which they modified: the Wagner Act established the Board as an instrument to oversee the unionization of industry. *See, e.g.*, R. GORMAN, LABOR LAW 5 (1976). In such a context, the Board naturally had a major policy-formulating role. Under Taft-Hartley, by contrast, the Board had become more of an adjudicator of rights which were already substantially defined. Because there was significantly less room for policy initiatives in 1947 than there had been earlier in the life of the National Labor Relations Board, it was easier to separate the prosecutorial function from the adjudicating function remaining in the Board.

sponsibility for formulating labor policy, whereas in the alternative model that responsibility does not lie in the adjudicating tribunal. Second, for the alternatively structured agencies, which handle extremely heavy caseloads, adjudication is not an apt vehicle for policymaking.

D. The Benefit Agencies

1. As Seen by the Attorney General's Committee

In its Final Report, the Attorney General's Committee excluded the principal benefit-granting agencies from its description of administrative adjudication. It did so on the ground that hearings conducted by these agencies merely augmented ex parte investigations which the agencies conducted on the claims before them.[70] This subordinate role played by hearings in the benefit-granting agencies made the Committee's general analysis of agency adjudication—including its careful review of separations-of-functions issues—inapplicable to the benefit agencies.

In a report concerning the Veterans Administration, the Committee's staff described a huge bureaucracy struggling to dispose of a gigantic caseload and to maintain uniformity in its treatment of claims.[71] Decisions were made by various boards and reviewed internally by the Board of Veterans' Appeals.[72] Because

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70 Thus, according to the Committee, the "decisions [of the Veterans Administration] rest upon the whole investigation, rather than merely upon that portion of it which is embraced by the hearing." FINAL REPORT, *supra* note 33, at 55. The Committee appears to have taken a similar view of claims processing by the Social Security Administration and the Railroad Retirement Board. *Id.*

71 The report on the Veteran's Administration by the Committee's staff describes an agency struggling with a large caseload. Various officials and hearing panels are at work. The agency is reported to be concerned about uniformity of treatment among the many hearing tribunals, and various devices are employed to induce uniformity, including the use of coded symbols designed to facilitate comparisons of cases and therefore uniformity of treatment and rotating members of hearing boards. U.S. ATTORNEY GEN'S COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 186, 76th Cong., 3d Sess., Pt. 2 (*Veterans Administration*) 26-27 (1940). This monograph reported concern expressed by various veterans' organizations that the large caseload of the Veterans Administration would hinder Administration officials from giving adequate attention to each case. *Id.* at 43. The monograph's authors drew an analogy between the Administrator and the head of a large university, who must attempt to maintain an overall coherence in its program. Among the various managerial devices used by the Administration to deal with its caseload in a coherent and fiscally responsible way were rulemaking—which did not require any procedures at all prior to the rules taking effect—and a rules-and-regulations unit charged with the "coordination" of rules.

72 In 1933 Franklin D. Roosevelt created the Board of Veterans' Appeals by Execu-

most decisions were not subject to judicial review, the Administrator's attempts to impose control over administration were not hampered by the courts. There was no independent corps of hearing officers to assert their independence from the Administration. And because rules and other directives could be made without advance procedural requirements, rulemaking was a relatively cost-free tool available to the Administrator for exercising control over the decisions of the internal tribunals. Although the Committee did not analyze the matter as such, it is apparent that the Administrator's control over work assignment, his power to issue rules without prior procedures, and his freedom from judicial review all contributed to his ability to control the way in which claims were processed in the agency organization. The Committee did not even discuss the possibility of locating the adjudicative function of the Administration in an independent tribunal. It did not discuss that possibility, because it was evident to the Committee that such an alternative arrangement would detract from the Administrator's ability to control the aggregate dispensation of benefits.

2. Evolution of the Benefit Agencies

Although the alternative agency structure discussed in this Article may have been present in nascent form in benefit administration before World War II, the peculiar compatibility between that decisional structure and mass benefit programs has become increasingly apparent as welfare administration has become ever more formalized and impediments to the adjudication of grant decisions have eroded.

Welfare and other benefit programs have undergone substantial development in theory, practice, and popular understanding during the present century. In the New Deal era, Congress provided support for state welfare programs by enacting the Aid to Families with Dependent Children (AFDC) program as part of the Social Security Act.[73] The AFDC program has been supported principally by federal funding, but it has been administered by

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tive Order. Exec. Order No. 6230, Part II (July 28, 1933), *reprinted in* CONGRESSIONAL INFORMATION SERVICE, PRESIDENTIAL EXECUTIVE ORDERS AND PROCLAMATIONS ON MICROFICHE, 1933-EO-6230 (1986). In 1958, it was established by statute. Pub. L. No. 85-857, ch. 71, 72 Stat. 1240 (1958) (codified as amended at 38 U.S.C. §§ 4001-10 (1988)).

73 Pub. L. No. 74-271, tit. IV, 49 Stat. 627 (1935) (codified as amended at 42 U.S.C. §§ 601-17 (1988)).

state officials. From the establishment of the program in 1935, however, Congress has required that the administering state agency provide rejected claimants with an opportunity for a hearing.[74]

For a variety of reasons, relatively few people took advantage of that procedural opportunity prior to the late 1960s. One structural reason may have been the apparently common practice of the states to administer the program through a system of close caseworker supervision of welfare clients.[75] Because such a system typically involves individualized valuative judgments by the caseworker regarding grants for particular expenditures by each welfare client, the administrative decisions tend to be highly discretionary and concomitantly ill-adapted to judicial treatment and the formal hearing format.

It was during the 1960s that welfare administration began to define benefits, systematize distribution of benefits, and move away from the earlier mode of close caseworker supervision and individualized disbursements.[76] As welfare administration became depersonalized, welfare decisions became amenable to a judicial process. In addition, the activist social movements of the 1960s provided the impetus for beneficiaries to use the available legal procedures to assert their rights. The Supreme Court's decision in *Goldberg v. Kelly*[77] publicized and ratified this evolution in welfare administration. In *Goldberg*, the Court ruled that welfare grants were legal entitlements and mandated governmental compliance with an array of procedural requirements for terminating an individual recipient's benefits.[78] Recipients became entitled to pre-

74 Pub. L. No. 74-271, § 402(a)(4) 49 Stat. 627 (1935) (codified as amended at 42 U.S.C. § 602(a)(4) (1988)).

75 *See* Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1201-02 (1983).

76 *Id.* at 1201-06.

77 397 U.S. 254 (1970). *Goldberg* emphasized the nature of welfare grants as legal entitlements and cast the procedures due welfare recipients in constitutional terms. *Goldberg*'s requirement that an evidentiary hearing must precede the actual termination of benefits was a significant overlay upon the procedures which had developed up to that time. Apart from the timing of the termination hearing, almost all of the procedures which the Court ordered in conjunction with welfare terminations were already being provided by New York, the state whose administration was under attack in that case.

78 *Goldberg*'s view of welfare benefits as legal entitlements was radically different from the view which prevailed in the immediate pre-World War II period, when the Attorney General's Committee issued its reports. Under the new view, agencies could not terminate benefits without affording the claimant an opportunity to contest the validity of the termination in an evidentiary hearing. *Id.* at 254. That hearing was not incident

termination hearings involving almost all of the traditional characteristics of trials.

Because welfare administration had evolved over a substantial period and because the required hearing rights had not been widely used prior to the 1960s, the legal profession had given inadequate attention to the kind of administrative structure which was appropriate to the decisions of mass benefit agencies. A striking aspect of the majority opinion in *Goldberg* is the elaborate detail in which it imposed procedures upon such agencies without any apparent consideration of their peculiar problems. Indeed, *Goldberg* exacerbated the organizational burdens carried by welfare agencies in two ways: it imposed a set of strict procedures upon them and, by requiring an administrative hearing before benefits could be terminated, created conditions which would engender a substantial increase in the demand for hearings. *Goldberg* thus highlighted the fundamental problem of mass benefit agencies: how to relate procedural fairness to administrative costs and to the amounts in dispute.[79] While *Goldberg* did not provide guidance for the resolution of this problem, it did focus attention upon the organizational characteristics of mass-benefit agencies. These agencies are distinguished by their large caseloads and administrative hearings which do not play any significant policy role.

E. The Turn Away from Adjudication as a Regulatory Technique

By the early 1960s, many of the traditional regulatory agen-

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to an ex parte investigation which formed the principal basis for the decision. *Id.* at 271; *see supra* note 70 and accompanying text. And the hearing had to be conducted by an official who had not participated in the initial decision to terminate. *Id.* at 271. By extension, *Goldberg* implies that the hearing results would not be reviewable by an official who had been involved in the agency's decision to terminate. Even so, this is not necessarily a rejection of the traditional adjudicatory model for welfare administration, because the agency head who sits as the final reviewing authority in the traditional model need not have been personally involved in the individual decision to terminate. *Goldberg* created, however, a decisional structure in which the adjudicating officials played a more important and independent role than did the adjudicating officials in the benefit agencies evaluated by the Attorney General's Committee.

79 Responding to *Goldberg*, Judge Friendly argued strenuously that while fairness was a universal norm, procedural protections must be weighed against their cost. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975). The Court ultimately adopted a cost-benefit component to its due-process hearing analysis as applied to mass benefit agencies administering programs other than welfare. Mathews v. Eldridge, 424 U.S. 319 (1975). *But see* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 39-45 (1976) (criticizing the cost-benefit approach as applied to disability determinations).

cies were burdened with unmanageable caseloads.[80] James Landis, writing to President-Elect John Kennedy in late 1960, reported that the Federal Power Commission was unable to cope with its large caseload through individual rate-setting proceedings.[81] He recommended that the Commission make use of generic or area-wide proceedings to achieve control over its workload. In the early 1960s, the Federal Communications Commission and the Interstate Commerce Commission established intermediate appellate review boards to dispose of routine appeals and give those Commissions more time for cases raising significant policy questions.[82] Review boards were subsequently endorsed by the Administrative Conference and others as a remedy for overburdened agencies.[83] By the mid-1960s, the Federal Trade Commission was seriously attempting to carry out its responsibilities through rulemaking,[84] a controversial power which the courts only some years later confirmed.[85] By the mid-1970s, Congress specifically conferred rulemaking power on the Commission.[86] Many of the new regulatory agencies which Congress created in

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80 *See, e.g.*, Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 317 (1983).

81 J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 54-58 (1960). The use of area-wide rate proceedings by the FPC received final judicial approval only later in the decade. Permian Basin Area Rate Cases, 390 U.S. 747, 789-90 (1968).

82 Review boards were authorized for the FCC by Pub. L. No. 87-192, § 2, 75 Stat. 420 (1961) (codified at amended at 47 U.S.C § 155 (1988)) and for the ICC by Pub. L. No. 87-247, 75 Stat. 517 (1961) (codified as amended at 49 U.S.C. § 10322 (1988)). *See* 47 C.F.R. § 0.161 (1990) (FCC Review Board); K.C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 14:19 (2d ed. 1978); Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546, 549-58 (1969) [hereinafter *Review Boards*]; Freedman, *Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation No. 6*, in 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 125, 128-37 (1971) [hereinafter ADMINISTRATIVE CONFERENCE]; Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325 (1968).

83 ADMINISTRATIVE CONFERENCE, *supra* note 82, at 122-24, 150-54; *Review Boards*, *supra* note 82, at 571-75.

84 *E.g.*, 16 C.F.R. 408 (1965) (rule regulating advertising and labeling of cigarettes) *vacated by* 30 Fed. Reg. 9484 (1965) (after Congress passed Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-41 (1988))). *See also* FTC, *Statement of Basis and Purpose of Trade Regulation Rule*, 29 Fed. Reg. 8325 (1964) (lengthy justification for cigarette advertising regulation).

85 National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. 1973), *cert. denied*, 415 U.S. 951 (1974).

86 Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2193 (1975) (codified as amended at 15 U.S.C. § 57a (1988)).

the 1960s and 1970s were designed to regulate primarily through use of the rulemaking power.[87]

All of these developments revealed to ever-wider audiences the limitations of the traditional regulatory model. But these limitations could always have been deduced logically from its structure: as devices to shape policy by dealing with a small number of cases in adjudications, and a larger number of others only in negotiations, the traditional structure worked well; but it was not well adapted to shape the behavior of very large numbers of individuals or firms, or to administer any large-scale program.

VI. DIFFERENT STRUCTURES FOR DIFFERENT TASKS

Regulatory experience in the post-World War II era demonstrated that the traditional paradigm of agency policymaking through adjudication did not universally fit all administrative tasks. The traditional agency involved the agency heads in policymaking at the review stage in adjudication. This structure was best adapted to deal with a regulatory context in which important questions of policy were raised in a relatively small number of factually unique adjudications.[88] The structure represents

87 *See, e.g.*, Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified in relevant part at 15 U.S.C. §§ 2058, 2060 (1988)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified in relevant part at 29 U.S.C. § 655 (1988)); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified in relevant part at 30 U.S.C. § 811 (1988)); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified in relevant part at 15 U.S.C. § 1392 (1988)). *See generally*, Gifford, *Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm*, 32 ADMIN. L. REV. 577 (1980). Because judicial review of rulemaking takes place on the administrative record, rulemaking procedures have often taken the form of an extended dialogue between the agency proponents of a rule and its critics. Moreover, under some of the new regulatory statutes, such as the Federal Trade Commission Improvements Acts of 1975 and
1980, elaborate rulemaking procedures have been imposed upon the agencies. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified in relevant part at 15 U.S.C. § 57a(a)-(c) (1988)); *supra* note 86. Rulemaking under such legislation takes on characteristics of adjudication. Nevertheless, the promulgation of comprehensive and generic standards through rulemaking is generally more cost-effective than the process of working out standards through case-by-case adjudication in fact-specific contexts.

88 *See* Gifford, *Discretionary Decisionmaking in Regulatory Agencies: A Conceptual Framework*, in MAKING REGULATORY POLICY 233, 238-39 (1989).

As I use the terms in this Article, a "small" number of adjudications means a number of adjudications per time period that can be handled by the agency head, giving sufficient time to each as the saliency of the issues merit. A "large" number is a number that exceeds the capacity of the agency head to decide. It is impossible precisely to quantify these terms because the complexity of cases can be expected to vary widely,

a managerial model of administration in which each instance of disapproved behavior is remedied by an agency order directed to a named respondent.[89] The traditional structure is also useful as a mechanism for formulating policies that apply beyond the particular case before the agency, when all of the consequences of new policies are not foreseen in advance and the regulatory context permits the development of behavioral standards over time. Because policymaking in adjudication can be tied to factual findings, adjudication can gradually extend the scope of a policy as its ramifications become increasingly understood. It can also introduce modifications as unforeseen factors emerge.[90]

Although adjudication in the traditional structural format can be used to influence the behavior of persons other than respondents, it is not well adapted to comprehensive behavioral control because its precedential effects are limited. First, most regulatory agencies can enforce compliance with precedents only through new adjudicative proceedings which themselves will culminate only in a cease-and-desist order; no penalty attaches until a person violates an order directed against it personally and, in many agencies, not until a person refuses to comply with a court order to obey the agency's order. Second, because adjudicatory orders are always written in a factual context, that context provides numer-

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especially among the various agencies. A broad sense of the numbers of adjudications which can and cannot be handled by an agency head can be drawn from the actual work of the agencies. Thus, in fiscal 1987, the NLRB handled 767 contested unfair labor practice cases in addition to its other work. *See supra* note 48. In that year, 160 FTC decisions were reported. *See* volumes 108-09 of the Federal Trade Commission Decisions. The 1986-87 CCH OSHD Reporter contained 306 OSHRC decisions.

By contrast, the 20-member SSA Appeals Council disposed of 52,000 review level cases in fiscal 1986 and 79,500 in fiscal 1988. Koch & Koplow, *supra* note 28, at 242 n.233. ALJs disposed of 220,313 cases in fiscal 1986. *Id.* at 223 n.136. Case volumes of such magnitude patently require large numbers of adjudicators, even at the final stage of administrative review. As the text observes, the rationale for the traditional structure does not fit such caseloads.

89 *See* Gifford, *Communication of Legal Standards, Policy Development and Effective Conduct Regulation*, 56 CORNELL L. REV. 409, 461 (1971); Gifford, *supra* note 88, at 240. In his application of quantitative analysis to administrative agencies, Ronald Cass has identified small docket/long case and large docket/short case categories of agency work. Cass, *supra* note 9, at 25 (1986). As Cass observes, the small docket/long case category identifies an agency whose caseload is made up of cases with important policy components. The polar opposite category exemplifies the mass-benefit agencies whose characteristics are discussed in text.

90 Yet, even here, the type of policy which is developed through a series of adjudications is likely to be less of a precisely drawn behavioral standard as such than a principle applicable in a future adjudication.

ous ways of distinguishing the prior ruling, providing both an excuse for not complying and a basis for further adjudication.

The traditional structure has sometimes been modified by interposing review boards to dispose of routine appeals, and sometimes by giving the agency head the power of discretionary review.[91] Both modifications are attempts to limit the caseload of the agency head to adjudications which raise important policy issues. They can work effectively in circumstances in which a relatively small proportion[92] of the agency's caseload involves important issues of policy and when those issues arise in unique factual configurations. They presuppose, however, that the application of policy to particular cases warrants the direct attention of the agency head.

Two major factors stand out as characteristics of the traditional structure and its variations. First, the traditional structure is constrained by the limited time of the agency heads. While this contraint is inevitable, to some degree, it is peculiarly limiting in the case of the traditional structure because of the demanding role the agency head plays in reviewing adjudication. That structure, accordingly, can perform properly only to the extent that the number of adjudications brought before the agency heads in any time period does not exceed their abilities to resolve. When the caseload is too large, the agency organization becomes dysfunctional.

Second, the traditional structure assumes that in some significant number of adjudications, policy application to the particular respondents is salient. Otherwise policy could be formulated by rule. Even the review-board modification is premised upon this assumption; insofar as it is designed to provide a means for disposing of routine cases while preserving for the agency head the ability to control the adjudicative outcome of particular cases.

The usefulness of the traditional structure thus depends both upon the nature and size of the agency's caseload and its operational goals. When the agency needs to shape conduct on a mass scale or to administer a mass benefit program, the traditional model, even with the review-board or limited-review modifications, begins to lose its organizational advantages. It is also ill-adapted to regulatory or administrative tasks involving adjudication of a very

91 *See supra* note 9.

92 A "small" proportion, in context, means a total number of cases which does not exceed the capacity of the agency head to resolve. *See supra* note 88.

large number of cases.

First, the mere size of the agency's caseload may render ineffective the use of adjudication as a policy formulating device. When the caseload becomes very large, then the disposition of a single case does not raise a salient matter of policy. At that point, the agency head no longer needs to possess reviewing authority over particular cases, which the traditional agency structure provides.[93] This is surely true of the administration of welfare or the social security disability program.

Second, when an agency bears the responsibility for imposing behavioral standards upon large numbers of subjects, that task calls for (1) more precise standards than adjudication can provide and (2) standards articulated in advance—a task for which rulemaking is best adapted. Moreover, without the further power to impose rules backed by penalties, the agency cannot hope to effectively regulate the conduct of large numbers of subjects. Only penalties, not cease-and-desist orders, provide incentives for nonparties to observe agency policies. Again, therefore, the ability of the traditional regulatory structure to confer ultimate adjudicatory authority upon the agency head becomes useless in these circumstances. Thus, even when an agency is not burdened with a huge caseload, if all or most of its policy decisions are generic ones, then its task can be performed effectively through rulemaking.[94] To the extent that policymaking is generic, there-

93 Even in such a context, an agency head exercising discretionary review could still use that reviewing role as a method for announcing policy. But, since the policy issues would be generic, the justification for the traditional structure would have disappeared. Moreover, the reason why policy is sometimes better announced in adjudications than in rulemaking is because the policy needs to be qualified by the factual context, leaving refinements to be worked out in future adjudications. But in a mass benefit agency, policy generally needs to be communicated in a comprehensive form in which administrative discretion is minimized.

The basic congruence between the traditional structure and a small volume of cases raising policy issues, on the one hand, and the alternative structure and a high caseload, on the other, was noted in Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383, 385 (1984). In that article, Lubbers reported that federal agencies in the aggregate were using adjudication less for deciding regulatory policy issues and more for the administration of "mass justice" programs. This development, Lubbers reported, had "helped revive proposals to separate agency adjudicators from the rest of the agency."

94 Generic policymaking through rulemaking is appropriate when the full range of applicable factual contexts can be identified in advance. By contrast, adjudication as a method of formulating policy is useful for limiting the scope of policy pronouncements to stated factual contexts. When factual configurations may vary in unpredictable ways, formulating policy and expanding its scope cautiously and incrementally through a series

fore, the traditional agency structure loses its rationale, regardless of the size of the adjudicative caseload.

Thus, in regulation concerned with workplace safety[95] or with the environment,[96] for example, regulation involves the use of generic rules and small or moderate adjudicatory caseloads. This is because the mandated goals involve widespread and immediate compliance with precise behavioral standards. In such contexts, adjudication should be limited, so far as possible, to factual disputes over whether respondents have complied with outstanding rules. Ideally, most policy issues would be resolved in rulemaking; adjudications would be factually (rather than policy) focused and they would be relatively few in number.

When, from time to time, the traditional structure is attacked as unfair or as presenting the appearance of unfairness because the agency head who is charged with overall supervision for administration and/or enforcement is also the final adjudicator, there may be a simple way to resolve the dispute. Analysis of the task given to the agency in question may indicate whether or not that task is congruent with the traditional structure. As regulatory and benefit programs extend their reach and the comprehensive-

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of adjudications has the advantage of limiting policy applications to factual contexts that are fully understood at the time of application. When an agency must impose behavioral standards upon a wide range of conduct immediately, however, it is denied the luxury of proceeding incrementally through a series of fact-intensive adjudicatory pronouncements.

95 On the regulation of workplace safety, *see infra* notes 104-06 and accompanying text.

96 In its administration of the Clean Air Act, the Environmental Protection Agency (EPA) possesses elements of both a traditional agency structure and an alternative structure. This structure may reflect a congressional belief that while most policy issues are generic ones, some issues of application are nonetheless regulatorally salient. The EPA issues national ambient air quality standards (NAAQS) which the states are to implement through the issuance and enforcement of EPA-approved state implementation plans (SIPs). Under this scheme, the EPA would set standards, but enforcement would be left primarily to the states. For violations of state enforcement plans, however, the EPA retains enforcement authority which it exercises by issuing orders enforceable in the courts or by bringing civil actions for penalties. 42 U.S.C. § 7413(a)(b) (1988). *See, e.g.*, General Motors Corp. v. United States, 110 S.Ct. 2528, 2530 (1990). Persons charged with violations of stationary-source emission limitations who challenge notice of noncompliance are entitled to be heard in an on-the-record proceeding. 42 U.S.C. § 7420(b)(5) (1988). The structure of this regulatory scheme, which is designed to employ state enforcement, assumes that major policy matters will be disposed of in the issuance of the NAAQS and the approval of the state SIPs. The EPA (but not necessarily the state) enforcement employs the traditional administrative structure to deal with the significant, albeit lesser, policy matters arising in cases where stationary source operators challenge notices of noncompliance. *See* 40 C.F.R. § 66.95 (1989).

ness of their concerns, the traditional structure may become an increasingly less-suitable organizational form.

In the benefit agencies, the efficient disposition of a large volume of benefit claims demands the use of relatively precise standards, whose applications do not raise significant policy issues. Welfare administration had generally been moving in that direction since at least the 1960s.[97] Moreover, the judicialization of benefit procedure required under *Goldberg v. Kelly* was compatible with the transformation of welfare programs from an approach involving individualized approvals of grants for special purposes into an approach involving general purpose grants.[98] The result was less individualization in administration and a greater use of more precise and broadly applicable standards—the paradigm case for rulemaking.

In a mass-justice agency, adjudication is unsuited for use as a vehicle for announcing or formulating policy.[99] The cases come too fast and in too great a volume for decisionmakers to look to other cases as guides; sorting out, distinguishing or following large volumes of cases whose holdings are necessarily circumscribed by their unique factual configurations is impractical.[100] Thus, in a mass-justice agency, the agency head does not rely on adjudication to control policy and, accordingly, does not sit as a final adjudicator. Moreover, the removal of the agency head from control of adjudication is fully consistent with the agency head's policy responsibility because no individual case is programmatically salient. The agency head is not concerned with the disposition of any one case, but with the policies applied to large classes of cases.

These differing regulatory approaches are the necessary result of the underlying differences in the regulatory or administrative

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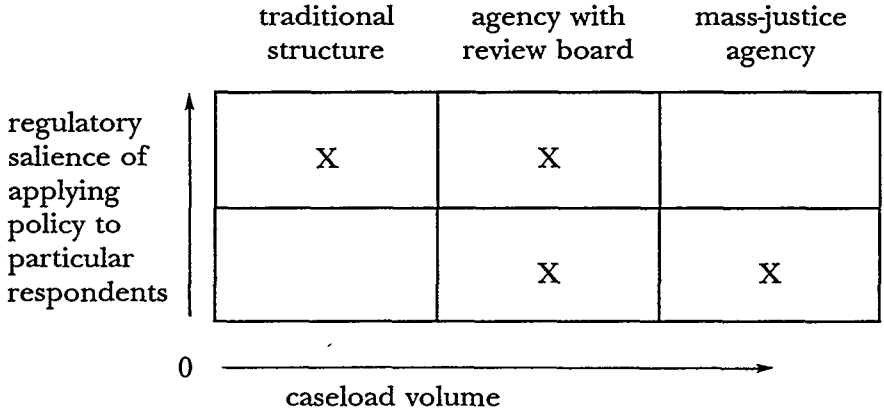
97 *See generally* Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1201-04 (1983).

98 *See id.*, at 1202 (relating the consolidation of need standards in welfare administration from a variety of special recurring or nonrecurring needs to a general uniform need standard based upon family size).

99 *See supra* note 48 and accompanying text.

100 Adjudicative decisions can be used, however, as a data base from which the policy making authorities can later draw to issue directives on how to dispose of selected issues raised in some of the cases. Thus the Social Security Administration uses cases to issue Social Security Rulings. In a similar vein, the Internal Revenue Service issues Revenue Rulings which are those of its private rulings raising the most important policy issues. *See* Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 INST. ON FED. TAX'N 1 (1962); Gifford, *supra* note 88, at 258.

tasks assigned to the agencies. The approaches correspond, respectively, to the differing structural capacities of the traditional regulatory agency on the one hand, and of an agency which deals with a high-volume caseload or regulates large numbers of subjects on the other. Indeed, the ideal design of agency organization could be represented on a chart which relates the kinds of policy applications to their appropriate decisional structure.



The traditional structure, for reasons already stated, is best suited to administer a regulatory program in which a small number of cases will be adjudicated and each case is regulatory salient. As the caseload increases in volume, the disposition of some particular cases may remain salient, but the individual dispositions of many cases will not raise significant issues of regulatory or administrative policy. For such a caseload, the traditional structure augmented by an intermediate review board is a good response. This structure allows the agency head to sit as final adjudicator for those cases raising significant policy issues, but allocates to the review board the disposition of routine cases. For agencies with extremely large caseloads, typically no individual disposition decisions are salient in themselves. Important issues of policy are resolved in generic rulemaking proceedings which produce standards governing behavior or the disposition of future cases. This type of caseload, accordingly, tends to be centered on the resolution of factual disputes rather than policy issues.[101] For this type

101 Even in this regulatory context, some agencies do respond to large numbers of

of caseload, adjudication of cases by a separate or quasi-separate administrative organ is the best response. Indeed, in the case of large-scale benefit or other programs, the volume of adjudication may be so large as to render ineffective attempts to control policy through the administrative appellate review process.

Other agencies, like OSHA,[102] do not conform to the traditional model, even though the number of adjudications arising under their regulatory statutes would not necessarily preclude it. For such agencies, the traditional structure has no appealing advantage. These agencies, which are charged with implementing behavioral changes on a wide scale, announce the required conduct norms through precisely drafted rules. Controversial policy issues are addressed in rulemaking, so that subsequent enforcement disputes involve primarily factual and lesser policy issues. Because major policy issues are resolved in rulemaking, and the dispositions of particular factual disputes are not in themselves regulatorally salient, there is little reason for the policymaking organ to adjudicate, even though the adjudicatory caseload would not itself preclude it. In this context, the traditional structure loses its appeal.

This evaluation of the nontraditional paradigm requires a word of caution. The discussion so far has focused upon the circumstances in which the traditional structure does not fit the administrative task to be performed. Yet, all agency structures can become dysfunctional when they do not match the tasks to which they are applied. Accordingly, the nontraditional structure itself becomes dysfunctional when adjudicatory decisions involve significant policy components. This was the point made by the critics of Hector and Minow. The same point has been forcefully made by Professor Strauss[103] in his criticism of the version of the nontra-

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requests for advice, the answers to which may involve the resolution of issues of policy. These responses, though, typically do not involve the participation of the agency head, except indirectly in the form of general supervision over a staff of lower-level employees charged with dealing with routine responses. The Internal Revenue Service, for example, responds to large numbers of requests for advance rulings on the tax consequences of proposed transactions. It is able to perform this task by delegating the responsibility for routine responses to lower echelon officials. It then selects a small number of the most important rulings for higher-level review and publication as Revenue Rulings in the *Internal Revenue Bulletin*. In this way, the agency as an institution is able to resolve numerous fact-specific issues of policy without imposing heavy commitments upon the time of the agency head.

102 *See infra* notes 104-15 and accompanying text.

103 Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department:*

ditional structure implemented in the Department of the Interior's establishment of the Board of Land Appeals, a reviewing tribunal isolated from the proper policymakers in the Department's Bureau of Land Management. Because the disposition of particular cases may involve important policy issues, the Board is exercising a policymaking role that belongs to the Bureau.

VII. OPEN QUESTIONS ON AGENCY—ADMINISTRATIVE LAW JUDGE RELATIONSHIPS IN NONTRADITIONAL AGENCY STRUCTURES

Procedural issues whose roots lie in the organizational structure of the nontraditional agencies are beginning to arise in the courts. Cases arising under the Occupational Safety and Health Act and under the Veterans Act raise issues of the appropriate degree of deference to which the administering authorities are entitled. Cases arising under the Social Security Act raise issues of the degree to which the administering authorities are entitled to exercise management-like controls over the adjudicatory processes. In their most narrow form, these issues are resolvable within the confines of the particular enabling acts, but analogous issues are likely to arise in the future under other statutes incorporating nonparadigmatic agency structures for administering programs. In the resolution of these future disputes, the ultimate dispositions of today's conflicts will provide sources of guidance. Moreover, an appreciation of the underlying administrative structure and its operational rationale can contribute to the resolution of these conflicts.

A. The Administration of the Occupational Safety and Health Act

Under the Occupational Safety and Health Act,[104] the Secretary of Labor administers a program designed to ensure the health and safety of workers. To carry out this responsibility, the

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Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1254-1260 (1974).

104 Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1988)). The operations of the independent review tribunals created under the Occupational Safety and Health Act and the Federal Mine Safety and Health Act are reviewed in Johnson, *The Split-Enforcement Model: Some Considerations from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987). *See also* Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 1988 RECOMMENDATIONS & REPS. OF THE ADMIN. CONF. OF THE U.S. 281.

Secretary issues rules and enforces them by assessing civil fines against violators.[105] The enforcement proceedings brought by the Secretary are adjudicated before an administrative law judge, with an opportunity for administrative appeal to the Occupational Safety and Health Review Commission. The Commission is an independent body established by the statute to adjudicate alleged violations of OSHA rules.[106] Commission members are appointed by the President, confirmed by the Senate and hold office for a term of years. The structure is supposed to make the Commission independent from the Secretary, while the federal courts provide further review. Congress opted for a similar administrative structure under the Federal Mine Safety and Health Amendments Act of 1977,[107] where the Federal Mine Safety and Health Review Commission (whose members hold their offices for statutory terms under presidential appointments[108]) reviews adjudicative decisions by ALJs in enforcement proceedings brought by the Labor Secretary.

Despite this structural independence, a number of courts have had to face the issue of what degree of deference, if any, is owed by the Occupational Safety and Health Review Commission to the Secretary's subsequent interpretations of his own OSHA rules. This issue tends to arise by implication from the explicit issue faced by the courts: What, if any, deference do the courts owe to the Secretary's administrative interpretations when they are reviewing the decisions of the Commission?

Several circuits have taken the position that the interpretations of the Secretary's rules made by the Occupational Safety and Health Review Commission command deference from the courts, even when the Secretary supports a different interpretation.[109] The Third Circuit takes the view that the courts owe

105 29 U.S.C. §§ 655, 658-59 (1988).

106 The Commission, established under 29 U.S.C. § 661 (1988), is a three-member body that adjudicates citations issued by the Secretary of Labor against employers for violations of OSHA regulations. *Id.* § 659(c). Commission members are appointed by the President and confirmed by the Senate for six-year terms. *Id.* § 661(a). The Chairman of the Commission is authorized to appoint ALJs to assist in the performance of Commission functions. *Id.* § 661(e).

107 Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified in relevant part at 30 U.S.C. § 823 (1988)).

108 *Id.*

109 Dole v. OSHRC, 891 F.2d 1495, 1498 (10th Cir. 1989); Brock v. Bechtel Power Co., 803 F.2d 999, 1000 (9th Cir. 1986); Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127, 132 (6th Cir. 1978); Marshall v. Western Elec., Inc., 565 F.2d 240, 244 (2d

deference neither to the Secretary nor to the Occupational Safety and Health Review Commission.[110] The First, Fifth, and Seventh Circuits take the view that the Secretary's interpretation is entitled to superior deference, on the rationale that it is the Secretary who is charged by statute with the development of OSHA policy.[111] The logical import of such decisions is that the administrative law judge and the OSHRC also must defer to the Secretary's interpretations, since they state the governing policies.

These OSHA cases reveal how the issue of policy determination (which was the factor determining the structure of the traditional agency) can affect the operative structure of the alternative design here under review. Because the volume of cases handled by OSHRC is not so large as to render its adjudicative decisions worthless as precedents, that body can perform interstitial policymaking, thereby forcing the Secretary to resort to rulemaking to assert his own ultimate policy control. This structure imposes a higher degree of formality upon policy making and, by forcing the Secretary's exercises of policy control into a rulemaking mode, increases the cost of maintaining ultimate control.

The primacy of the OSHRC interpretation might be defended by an argument based upon its carefully crafted structural independence: OSHRC was given the form of an independent agency[112] precisely because Congress wanted to guarantee respondents that its decisions would not be skewed by influence from the Secretary on either the facts or the law. The response to this argument is that while policy input from the Secretary that is unique to the specific facts may indeed tarnish the image of

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Cir. 1977); Brennan v. OSHRC, 513 F.2d 713, 715-716 (8th Cir. 1975); Brennan v. Giles & Cotting, Inc., 504 F.2d 1255, 1261-1262 (4th Cir. 1974).

110 Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157 (3d Cir. 1978).

111 United Steelworkers of America, AFL-CIO v. Schulykill Metals Corp., 828 F.2d 314 (5th Cir. 1987); Brock v. Chicago Zoological Society, 820 F.2d 909, 912 (7th Cir. 1987); Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61, 63-66 (1st Cir. 1985). *See also* Brock v. Cathedral Bluffs Oil Co., 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) (Scalia, J., deciding a similar issue under the Federal Mine Safety and Health Amendments Act of 1977).

112 The Occupational Safety and Health Review Commission was proposed as an independent body by Senator Javits. S. REP. NO. 1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5218. *See* Verkuil, *supra* note 3 at 268. Although he initially failed to persuade the Senate Committee considering the bill which ultimately became the Occupational Safety and Health Act of the wisdom of adjudication by an independent body, he was successful in persuading the full Senate to adopt his proposal. *See* 116 CONG. REC. 37605-13 (1970).

OSHRC as a fair adjudicator,[113] general interpretations carry no such potential danger. If the Secretary has issued general interpretations of regulations which are independent from the particular case under adjudication, and if those interpretations are manifestly applicable elsewhere as well, then for purposes of respecting the independence of OSHRC, these interpretations are indistinguishable from regulations. It is, of course, another and different issue whether the Secretary should employ section 553 procedures in their issuance.[114] The design of the entire administrative structure under the Occupational Safety and Health Act confirms the latter conclusions. The Secretary is given broad power to formulate workplace standards. Two centers of policymaking would impede the effectiveness of this broad statutory grant. Centralization of policymaking in the Secretary argues for deference to his exercises in broad (nonspecific) statutory construction while the independence of OSHRC not only ensures that the Secretary cannot directly control factual determinations but argues against undue OSHC or judicial deference to the Secretary's constructions which are specific to a particular case.[115]

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113 Indeed it was just the potential exercise of this power to formulate individualized policy that, throughout their history, has tarnished the image of the traditionally structured regulatory agencies as fair adjudicators, at least in the eyes of their critics.

114 Interpretations generally do not fall within the requirements for notice-and-comment rulemaking contained in 5 U.S.C. § 553 (1988). *See* § 553(b)(A). Professor Cass Sunstein has recommended that the deference required of courts towards agency interpretations under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) not be extended to rules which have not been subjected to the rulemaking process. Sunstein, *Law and Administration After* Chevron, COLUM. L. REV. 2071, 2093 n. 106 (1990).

115 Support for a contrary argument might be drawn from the approach generally taken by the courts towards policymaking by the Benefits Review Board. The Benefits Review Board hears administrative appeals under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b) (1988) and the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1988). The courts have generally taken the view that the Benefits Review Board lacks policymaking power and is therefore fully subservient to the Secretary. Lukman v. Director, OWCOP, U.S. Dept of Labor, 896 F.2d 1248 (10th Cir. 1990); Lee v. Consolidated Coal Co., 843 F.2d 159, 162 (4th Cir. 1988); Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278, 1283 (6th Cir. 1987); Peabody Coal Co. v. Blankenship, 773 F.2d 173, 175 (7th Cir. 1985). *See* Mullins Coal Co. v. Director, O.W.C.P., 484 U.S. 135 (1987); Potomac Elec. Power Co. v. Director, O.W.C.P., 449 U.S. 268, 278 n.18 (1980).

The argument from statutory design for the independence of the Benefits Review Board, however, is not as strong as the analogous argument for the independence of the Occupational Safety and Health Review Commission or for the Federal Mine Safety and Health Review Commission. While the members of the latter two review commissions are presidential appointees holding their offices for statutory terms, 29 U.S.C. § 661(a) (1988), 30 U.S.C. § 823 (1988), the members of the Benefits Review Board are appoint-

B. The Administration of Veterans' Benefits

Although the Attorney General's Committee did not view the administration of veterans' benefits as involving adjudicative hearings in the same sense as it viewed the operation of the traditional regulatory agencies, the Veterans Administration did in fact conduct hearings at that time, and indeed it operated in a form similar to the other nonparadigmatic agency structures discussed here. Claims that went to adjudication first went before a panel of three officials, and disallowed claims could be appealed to the Board of Veterans' Appeals.[116] No judicial review was permitted.[117]

Although the basic structure just described has continued during the intervening decades,[118] increasing demands for decisional independence and formality resulted in establishing the Board of Veterans' Appeals as a statutory body.[119] More recently, the decisions of that Board have been subjected to review by a new and "independent" Article I court: the Court of Veterans' Appeals. Under the Veterans Judicial Review Act of 1988,[120] disallowance decisions are appealable to the new Court. Moreover, the new Act allows appeals from the Court of Veterans' Appeals to the Court of Appeals for the Federal Circuit.[121]

The legislative history of the new Act refers with apparent approval to the preexisting practice of the Board of Veterans' Appeals giving no deference to the Administration's prior decision. Congress expressed the expectation that the new Court of Veterans' Appeals will continue the practice of not deferring.[122]

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ees of the Secretary of Labor. 33 U.S.C. § 921(b) (1988).

116 *See* U.S. ATTORNEY GEN'S COMM. ON ADMIN. PROC., *supra* note 71, at 28, 50-51, 57-58 (1940).

117 *See infra* note 121.

118 *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 309-10 (1985); Note, *One Last Battle: Reform of the Veterans Administration Claims Procedure*, 74 VA. L. REV. 937, 939 (1988). In Bloch, *Report and Recommendations on the Social Security Administration's Administrative Appeals Process*, 1989 RECOMMENDATIONS & REPS. OF THE ADMIN. CONF. OF THE U.S. 28-31, the author compares procedures governing veterans' claims with those governing social security disability claims.

119 *See supra* note 72.

120 Pub. L. No. 100-687, 102 Stat. 4105 (1988).

121 Appeals from the Board of Veterans Appeals were barred under 38 U.S.C. § 211(a) (1982). Appeals could, however, be taken to the federal courts for violations of constitutionally-mandated procedures. *See, e.g.*, Marozsan v. United States, 852 F.2d 1469, 1473-75 (7th Cir. 1988).

122 H.R. REP. NO. 963, 100th Cong., 2d Sess. 7 (1988). Under 38 U.S.C. § 4004(c)

The structural independence conferred upon the Court of Veterans' Appeals suggests the appropriateness of this expectation. Although this practice of not deferring may seem at odds with those judicial decisions that effectively command deference by OSHRC to the Secretary of Labor,[123] the inconsistency may be only apparent. As suggested in the OSHRC discussion, the establishment by Congress of an independent adjudicative structure may indicate that Congress wants adjudications to be free from particularized policy inputs from the administering agency, but not necessarily free from the generalized policy formulations of that administering agency. The Committee Reports suggest that it is inappropriate for the Court of Veterans' Appeals to defer to the prior decision of the Veterans Administration in the case before it; they do not suggest that it is inappropriate for the Court to defer to generalized (and hence widely-applicable) interpretations by the Administration of its regulations.[124]

C. The Social Security Administration

The decisional structure employed by the Social Security Administration (SSA) in its operation and supervision of the social security disability program lies at the core of a number of contentious procedural issues involving attempts by the SSA to exercise managerial controls over adjudicatory processes. The SSA's aggressive management style is its response to reported widespread decisional inconsistencies in the evaluation of claims and increasing congressional concern over the costs of the disability program.

1. The Structure of the Disability Program

The administration of the social security disability program is split between the states and the federal government in a variety of ways.[125] Although it is a federally funded program, claims for

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(1988), however, the Board is bound by "the regulations of the Veterans Administration, instructions of the Administrator, and the precedent opinions of the chief law officer." A tradition of no deference in this statutory context would probably mean that the Board would not defer on individual application decisions but that it would be bound by the Administration's general policies.

123 *See supra* note 111 and accompanying text.

124 *See supra* note 122.

125 For a current and extensive description of the administration of the disability program, see Bowen v. City of New York, 476 U.S. 467, 470-72 (1986); Bloch, *supra* note 118; and Koch & Koplow, *supra* note 28. *See also* Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681. An inci-

disability payments are processed by an agency of the state in which the claimant resides.[126] The state agency resolves these claims under a set of guidelines provided by the Federal Social Security Administration, and its decisions are reviewed in the SSA's Baltimore office. Claimants who are initially denied may seek redeterminations. Ultimately, however, they may seek a hearing before a federal administrative law judge.[127] Claimants denied relief by an administrative law judge may seek discretionary review by the SSA's Appeals Council,[128] a reviewing tribunal composed of SSA employees,[129] and may appeal from the last administrative decision to a federal district court.[130] In addition to deciding appeals brought by dissatisfied claimants, the Appeals Council may review administrative law judge decisions on its own motion.[131]

2. Decisional Inconsistencies

Numerous studies have revealed widespread inconsistencies in the evaluation of claims throughout the administration of the disability program.[132] These inconsistencies have inhered in the

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sive recent critique of SSA administration can be found in J. MASHAW, *supra* note 30.

126 *See* Koch & Koplow, *supra* note 28, at 219-222.

127 *See* 42 U.S.C. §§ 405(b), 421(d) (1982); 20 C.F.R. § 404.929 (1990).

128 20 C.F.R. § 404.967 (1990).

129 *See* Koch & Koplow, *supra* note 28, at 238, 269.

130 42 U.S.C. §§ 405(g), 421(d) (1988).

131 20 C.F.R. § 404.969 (1989).

132 The House Committee on Ways and Means, reporting on the Social Security Disability Benefits Act of 1984, referred to inconsistencies between ALJ decisions and state agency decisions described in the Bellmon Report, a report to Congress mandated by the 1980 Disability Amendments. H.R. REP. NO. 618, 98th Cong., 2d Sess., *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 3038. *See* J. MASHAW, *supra* note 30, at 86 (referring to inconsistent decisionmaking reported by consultants). *See also* Gifford, *supra* note 30, at 987. The House Committee suggested that inconsistency between the state agencies and the ALJs may be explained by the fact that the state agencies are bound by the disability claims manual (POMS) while the ALJs are not. H.R. REP. NO. 618, *supra*, at 3057-58. The Committee also indicated that the SSA was undertaking to incorporate POMS in Social Security Rulings (SSRs) which the SSA views as binding the ALJs as well as the state agencies. *Id.* Koch and Koplow report, however, that many ALJs refuse to acknowledge the binding effect of SSRs. Koch & Koplow, *supra* note 28, at 280-81. While acknowledging discrepancies between the ALJs and the state agencies, the focus was upon inconsistencies among the ALJs as a group in J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ. P. VERKUIL, M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 21 (1978). *See also* J. MASHAW, *supra* note 30, at 190. In an even earlier study, Robert Dixon, Jr. reported on substantial internal disparities among decisions by federal hearing examiners (the predecessors to the ALJs). R. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 76-79 (1973). Dixon

state agencies' initial case evaluations, where widely differing rejection rates have extended from state to state. The disability program has also been affected by high rates of reversals by ALJs of state agency claim denials,[133] but, because claimants are free to add information to their files and thereby to provide ALJs with different records from those on which the state agencies had acted, this high reversal rate is not necessarily indicative of a more claimant-oriented approach by the ALJs. More apparently troublesome have been the extensive decisional inconsistencies among the ALJs themselves revealed in studies of the disability program. In response to widespread perceptions that the administration of the disability program was riddled with inconsistencies, Congress and the SSA have invoked a number of management techniques designed to reduce decisional inconsistencies and to impose other management controls on the adjudicatory process.

Studies of the disability program during the 1970s had pointed out that much of the decisional inconsistency in SSA administration lay in the class of claims which were not defined by the so-called "listings" or other criteria. The regulations contain a table of defined impairments which are presumed to meet the statutory requirements. These claims have usually been granted by the state agency.[134] Claims found to be "equivalent" to one of the listed impairments are similarly presumed to meet the statutory requirements.[135] A second category of claims which had usually been granted at the state agency level is that of an individual

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also suggested that substantial disparities within the SSA were obscured as the data were aggregated. *Id.* at 70.

133 Professor Robert G. Dixon, Jr., commenting upon the high reversal rates at the hearing-officer level, has pointed out the following contributing factors. (1) At the hearing-officer level, the decisionmaker is able to make an appraisal of the claimant's psychological condition as manifested before him, an assessment of which previous decisionmakers who were restricted to the paper record were incapable. (2) The presence of the claimant at the hearing may induce the hearing officer's sympathy. (3) Because hearing officers receive a class of cases from which the most obviously meritorious have been screened out, their natural tendency to vote affirmatively in some cases undermines their ability to uphold a stringent policy in borderline cases. (4) The imprecision in the standard for passing upon claims fosters reversals. (5) The general understanding that the hearing officer is not bound by a presumption against claimants in borderline cases which applies to state agency officials evaluating claims on a paper record encourages reversals by hearing officers. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 707-708.

134 20 C.F.R. § 404.1525 (1990).

135 20 C.F.R. § 404.1526 (1990). Disputes may arise here when the state agency fails to perceive an equivalence which is perceived by a claimant.

with a marginal education and long work experience limited to the performance of arduous unskilled physical labor who is unemployed because of a severe impairment. Such a worker has been presumed to be unable to do lighter work and thus able to meet the statutory requirements of disability.[136] The third, or residual, category of claims accounted for most of the appeals to ALJs. Under the regulations, claims which did not meet the foregoing standards were (and still are) evaluated for the claimant's residual functional capacity.[137] In evaluating such claims, a set of medical-vocational guidelines, in force since 1978, has limited the issues before both the state agencies and the ALJs. The medical-vocational guidelines, however, apply only to so-called "exertional" impairments.[138] In cases involving nonexertional impairments, the guidelines have not applied, providing a broader scope for possible controversy. Recent adoption of mental impairments listings, however, have subjected a major source of claims to structured evaluation.[139]

3. Attempts at Reform in SSA Administration

Reacting to the skyrocketing costs of the disability program and to wide variations in the way cases are decided both by the state agencies and the administrative law judges, Congress and the Secretary have sought to mitigate cost increases by securing more consistency in the program's administration. These attempts have involved the issuance of more precise regulations for the state administrators and the establishment of quality control programs over the decisions of both state agencies and the administrative law judges. The Administration has monitored the workload disposition rates of the administrative law judges and other aspects of their decisionmaking. Also, the Administration has selected some administrative law judges for a special substantive monitoring.

The Secretary, as a result of substantial study of the program's operation, issued so-called vocational guidelines in

136 20 C.F.R. § 404.1562 (1990).

137 20 C.F.R. § 404.1545 (1990).

138 *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e) (1990). *See also* 20 C.F.R. § 404.1545(c),(d) (1990). This aspect of the guidelines is discussed in Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575, 592 (1983).

139 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 12.00-12.09 (1989).

1979[140] under which the availability of work for various classes of workers has been removed as an issue in individual proceedings. In 1980, Congress mandated supervisory review of state-agency and administrative law judge decisions as part of a quality control program.[141] Pursuant to Congressional directive, the SSA reinstituted a practice of Appeals Council review of administrative law judge disability awards on its own motion,[142] after that practice had been discontinued for a number of years. Again, the Administration has established a practice under which special staff are assigned to cases in which attorneys represent claimants before administrative law judges.

In 1984 the SSA informed Congress that it was beginning to replace so-called directives to state agencies contained in its Program Operating Manual with Social Security Rulings (SSRs) which, in the view of the SSA, are binding upon the ALJs as well as the state agencies. The purpose of this change was to ensure that cases on appeal to the ALJs are evaluated by the same criteria as are applied by the state agencies.[143] This attempt by the SSA to impose consistent decisional criteria upon the state agencies and the ALJs seems to have been frustrated, however, by the unwillingness of many of the ALJs to accept the SSRs as binding upon them.[144] A major contribution to increased decisional consistency at the ALJ level could be made by requiring the ALJs to accept the SSRs, a requirement which seems broadly consistent with the demands which a number of courts have imposed upon the OSHRC[145] and with the deference statutorily required of the Board of Veterans' Appeals to the Department of Veterans' Affairs' instructions.[146]

4. SSA Attempts at Reform Through Management Techniques

Some of the administrative actions implementing these reforms have given rise to public controversies—often taking the

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140 *See* Rivers v. Schweiker, 684 F.2d 1144, 1151 (5th Cir. 1982).

141 Social Security Visibility Amendment of 1980, Pub. L. No. 96-265, § 304(c), 94 Stat. 441, 445-56 (1980) (mandated review of state agency determinations of disability); *id.* § 304(g) (review of ALJ determinations).

142 *Id. See, e.g.*, Barry v. Heckler, 620 (F. Supp.) 779 (N.D. Cal. 1985).

143 *See* H.R. REP. NO. 618, 98th Cong., 2d Sess. 20-22, *reprinted in* 1984 U.S. CODE & ADMIN. NEWS 3038, 3057-59.

144 *See* Koch & Koplow, *supra* note 28, at 280-281.

145 *See supra* note 111 and accompanying text.

146 *See supra* note 122.

form of litigation in the courts—between various administrative law judges or their representatives and the Secretary of Health and Human Services. The focus of these debates has been the relationship between the Department's Social Security Administration and the administrative law judges, and, in particular, the extent to which the Secretary of Health and Human Services may legitimately attempt to influence the ways in which the administrative law judges work.

The SSA has justified its management initiatives as designed to improve the quality and efficiency of the social security program. They are designed, it is said, to foster efficient disposition of caseloads, to reduce inconsistency in results, and to hold back the dramatic increases in cost which have afflicted the program in recent years. Many administrative law judges, however, have viewed these supervisory initiatives from the Secretary as intrusions upon their independence[147] which they have challenged in the courts. Disability claimants have also been quick to assert that these management efforts have interfered with their right to an impartial decision.

5. Issues Concerning the Legitimate Reach of SSA Authority Vis-a-Vis Administrative Law Judges

Disputes over the SSA's management techniques raise the question of the proper boundary between that agency's authority and the authority of an administrative law judge. Although the APA states that, on appeal from or review of a decision of an administrative law judge, the agency has all the powers that it would have in making the initial decision,[148] the practical division of authority between administrative law judges and most agencies has been largely between credibility determination on one hand and policymaking on the other.[149] The history of administrative procedural reform in this country largely follows that line. In the traditionally structured agencies, the agency head has always been permitted to reverse an administrative law judge decision on policy grounds. Moreover, any agency possessing rulemaking power may remove issues from adjudication, and hence from the concern of administrative law judges, merely by

147 A persuasive case for subjecting ALJs to performance evaluation is made in Scalia, *supra* note 43, at 76.

148 *See supra* note 47 and accompanying text.

149 *See supra* notes 52-53 and accompanying text.

using its rulemaking power to formulate generalized policies in advance.[150] The SSA has employed this technique in its vocational grid regulations[151] and, for practical purposes, in its listings criteria as well. But the SSA has been unable or unwilling to formulate other policies with sufficient clarity and comprehensiveness to reduce the disparity among the way ALJs decide cases. In the absence of precise and binding rules, the SSA has resorted to quality control programs and other management techniques. This novel approach to mass adjudication has forced a new and more precise examination of the extent to which management techniques can properly be classified as part of the policy control which belongs to the agency.

6. The Varieties of Management Techniques

(a) The Vocational Grid Regulations.—The use of vocational grid regulations was first challenged by a claimant as inconsistent with section 556(e) of the Federal Administrative Procedure Act, which requires that parties have the opportunity to rebut noticed facts.[152] The grid regulations themselves determine whether work is available in the national economy for claimants possessing defined characteristics, and the grid determinations are irrebuttable. These regulations were upheld by the United States Supreme Court in *Heckler v. Campbell*,[153] basically on the rationale of *United States v. Storer Broadcasting Co.*:[154] an agency can properly use rulemaking to remove a common issue from adjudicatory proceedings. Even before the Court reviewed them, however, the Fifth Circuit had upheld the vocational regulations against a similar attack. Using a similar but more elaborate reasoning, the Fifth Circuit concluded that (1) section 556(e) required only that parties have an opportunity to rebut noticed facts which were material; (2) the issue of job availability had been removed from the individual benefit proceeding by this *Storer*-type rule; (3) therefore there was no material issue of fact which remained in the case;

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150 *See, e.g.*, Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc., 462 U.S. 87 (1983); Heckler v. Campbell, 461 U.S 458 (1983); Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). The SSA employed just that technique in the vocational guidelines upheld in *Heckler*.

151 *See supra* notes 137-38, 140 and accompanying text.

152 5 U.S.C. § 556(e) (1988).

153 461 U.S 458 (1983).

154 351 U.S. 192 (1956).

and (4) consequently section 556(e) was inapplicable in the benefit proceeding. Restated, in terms of administrative-law-judge independence, the vocational grid regulations removed job availability from the cognizance of the administrative law judges. It was appropriate to remove this issue from the ALJs because job availability is a general or so-called "legislative-fact" question and it has long been widely recognized that rulemaking is a superior decisional technique for the determination of legislative facts.

(b) Workload Targets and the Monitoring of ALJ Decisions.—More interesting issues are raised when the agency sets workload targets and reevaluates decisions in a quality control program. The SSA has been employing a quality control system directed not only at state-agency administration but at ALJ decisionmaking as well.[155] One important aspect of quality control review involves so-called "own motion" review by the Appeals Council of certain classes of ALJ decisions. The categories specifically targeted for review have included: (1) a national random sample of cases; (2) allowance decisions of new administrative law judges; (3) decisions referred by the SSA's Office of Disability Operations; and (4) decisions of particular administrative law judges. The last category originally included administrative law judges having percentage allowance rates of 66-2/3s or higher and later was expanded to include administrative law judges identified by high Appeals Council reversal rates.[156]

The attacks on these techniques have characterized them as improper interferences with ALJ independence, and as the establishment of a decisional structure biased against claimants. The Ninth Circuit has been particularly hostile to this review program (also known as "Bellmon review", after the Bellmon Amendment which authorized it[157]). That circuit has ruled the Bellmon review program as invalid for want of proper rulemaking procedures implementing it[158] and constitutionally defective because it fostered decisional bias.[159] Other courts have found objection-

155 *See* Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980).

156 *See* Barry v. Bowen, 825 F.2d 1324, 1327 (9th Cir. 1987).

157 Social Security Disability Amendment of 1980, Pub. L. No. 96-265 § 304(g), 94 Stat. 441, 456 (1980).

158 W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987). *Contra* Dyer v. Secretary of Health & Human Services, 889 F.2d 682, 684 (6th Cir. 1989); Duda v. Secretary of Health & Human Services, 834 F.2d 554, 556 (6th Cir. 1987).

159 Barry v. Bowen, 825 F.2d 1324, 1330 (9th Cir. 1987). *See also* Hummel v. Heck-

able the targeting for review of the decisions of particular administrative law judges under the Bellmon review program.[160]

Bellmon review, which takes the form of a random sample selection of cases, does not raise the same specter of skewing decisionmaking against claimants. Moreover, there are sound reasons for an agency such as the SSA to collect data on administrative law judge performance, so long as data collection does not create undue pressure on the judges to distort their decisionmaking. The District Court for the District of Columbia, for example, thought that the collection of ALJ performance data was essential for the agency to perform its function of instituting removal proceedings before the Merit Systems Protection Board.[161] Another federal district court could see no problem raised by a request to an administrative law judge to account—in this case to the chief administrative law judge—for the fulfillment of her assigned quota of cases.[162] To the extent that it is the agency which is collecting data on ALJ performance for purposes of instituting removal actions, some tension is, of course, generated between the agency's concern over the administration of its program and the APA provisions designed to insulate administrative law judges from agency performance ratings—that is the purpose of the provisions entitling administrative law judges to be paid independently of agency recommendations or ratings.[163]

But Congress itself has mandated quality-control review and has expressed concern about the efficiency with which the disability program is administered, the consistency of its decisions, and the escalating costs of the program. Congress appears to see quality-control review as a legitimate—indeed, mandated—agency function. The challenge lies with the SSA to operate a program of quality control which respects the obligation of the administrative law judges to decide cases as they impartially view the record in the light of governing SSA regulations.

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ler, 736 F.2d 91, 94-95 (3d Cir. 1984); Grant v. Sullivan, 720 F. Supp. 462, 467-68 (M.D. Pa. 1989).

160 Salling v. Bowen 641 F. Supp. 1046, 1056 (W.D. Va. 1986), *dismissed as moot*, 679 F. Supp. 596 (W.D. Va. 1987); Association of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1142-43 (D.D.C. 1984).

161 Goodman v. Svahn, 614 F. Supp. 726, 730 (D.D.C. 1985).

162 *See* Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 350-51 (1986) (discussing ALJ accountability); Scalia, *supra* note 43.

163 5 U.S.C. § 5372 (1988).

(c) Appeals Council Review.—Review on its own motion by the Appeals Council has been attacked on the ground that such review is limited by regulation. Thus, the Secretary's regulation states that the Appeals Council will review an ALJ decision if there appears to be an abuse of discretion, if there is an error of law, if the decision is not supported by substantial evidence, or if a broad policy or procedural issue is involved.[164] Arguably, the regulation implicitly prohibits Appeals Council review unless one of these conditions are met.

The courts have faced this issue in circumstances in which the Appeals Council overturns an administrative law judge decision on grounds other than those listed in the Secretary's regulation and the case is appealed to a federal court. The court often finds that the decision of both the Appeals Council and the administrative law judge is supported by substantial evidence, and, since the court must affirm the Secretary's decision if supported by substantial evidence, the question before the court is whether the Appeals Council or the ALJ speaks for the Secretary. If the Appeals Council's review is limited to the named grounds in the cited regulation, then it would be the ALJ decision which the court should uphold. After a period in which the Courts of Appeals were split on the effect of the regulation, the matter has finally been resolved in favor of the unrestricted authority of the Appeals Council to grant review on its own motion.[165]

Restated in terms of administrative law judge independence, the cases that have considered the extent to which the Appeals Council may grant review on its own motion have necessarily defined and severely limited the ALJ's authority to evaluate disability claims with finality. Despite the weaknesses of Appeals Council

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164 20 C.F.R. § 404.970(a) (1990).

165 Welch v. Heckler, 808 F.2d 264, 267 (3d Cir. 1986); Bauzo v. Bowen, 803 F.2d 917, 921 (7th Cir. 1986); Mullen v. Bowen, 800 F.2d 535 (6th Cir. 1986); Fierro v. Bowen, 798 F.2d 1351, 1354 (10th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); Deters v. Secretary of Health, Educ. & Welfare, 789 F.2d 1181, 1184 (5th Cir. 1986); Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986) (en banc); Kellough v. Heckler, 785 F.2d 1147 (4th Cir. 1986); Taylor v. Secretary of Heath and Human Servs., 765 F.2d 872, 875 (9th Cir. 1985); Lopez-Cardona v. Heckler, 747 F.2d 1081, 1083 (1st Cir. 1984); Baker v. Heckler, 730 F.2d 1147, 1149-50 (8th Cir. 1984); White v. Schweiker, 725 F.2d 91, 93-94 (10th Cir. 1984).

Unanimity was reached among the Circuits when the Third and Seventh Circuits abandoned contrary positions. *See* Powell v. Heckler, 789 F.2d 176 (3d Cir. 1986), *overruled in* Welch v. Heckler, *supra*; Scott v. Heckler, 768 F.2d 172, 178 (7th Cir. 1985), *overruled in* Bauzo v. Bowen, *supra*.

review as an instrument of the Secretary's policy control for reasons already stated, the majority of the Circuits have perceived the Appeals Council's ability to reverse an ALJ as synonymous with the Secretary's exertion of policymaking control.[166] Courts have felt compelled to uphold the Appeals Council on such grounds.

(d) The Management Paradox.—The controversies surrounding the SSA are largely, although not entirely, reducible to the SSA's attempts to reduce disparity in decisionmaking at the same time it seeks to avoid greater quantification in its rules. Dixon, in the early 1970s, and Mashaw more recently, have argued that the most deserving cases are generally granted benefits at the state agency level. Under this analysis, the ALJs preside over the marginal cases—those which are closest to the line of ineligibility. In his book, *Bureaucratic Justice*, Mashaw has set forth an analysis suggesting that errors in favor of beneficiaries ("false positives") are increasingly costly for society as the handicap of the claimant diminishes.[167] If the most deserving cases are favorably disposed of at the state agency level, then false positives by ALJs would impose especially high social costs—costs which exceeded those of false negatives.

Under this analysis, actions taken by the SSA to reduce the number of false positives at the ALJ level would be justified by the greater cost of false positives. The criticism that the SSA is less interested in correcting false negatives than false positives loses some force when, in the range of cases before the ALJs, false positives are seen as imposing higher social costs than false negatives. This is not to deny that an effort aimed at deterring false positives produces individual injustice when it unintentionally results in a false negative. Rather, it is to assert that the SSA's efforts are properly directed at aggregate results, and that social welfare may be enhanced by efforts aimed at reducing false positives, even though a certain number of false negatives may also result from those efforts.

The Mashaw analysis, however, is limited in its impact. To the extent that the SSA has not formulated listings criteria for all of

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166 Mullen v. Bowen, 800 F.2d 535, 540-41 (6th Cir. 1986).

167 J. MASHAW, *supra* note 30, at 82-83. Mashaw also employs this analysis in other critiques of the SSA. *See infra* note 167. *See also* Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 91-92 (1983).

the most severe impairments, the analysis does not apply. Similarly, where the vocational grid regulations do not apply—as in the case of nonexertional impairments—those regulations cannot be relied upon as a basis for assuming that the most severe cases will be granted at the state agency level.

(e) Why Does Not the SSA Use More Rulemaking?—For those classes of claims where it has not provided decisional criteria to the ALJs, the SSA is implicitly asserting that rules do not play a useful role because of the highly fact-specific nature of the claims. Indeed, the decisional structure of disability determinations includes the ALJ hearing stage precisely to ensure that relevant elements which might otherwise be overlooked or omitted in bureaucratic assessments are made available to an authoritative decisionmaker. The ALJ hearing stage thus can be seen as designed to incorporate the nongeneric or factual elements specific to the case into the decisionmaking apparatus. An additional, and not inconsistent function which the ALJ hearing stage could be seen to play is to legitimize—through non-bureaucratic decisionmaking—the grant and denial decisions in the close cases for which there are no correct answers but only judgments as to whether one particular claimant is more or less deserving of benefits than the next.[168]

Rules (or other decisional criteria such as standards or guidelines) should reflect the extent to which common features make general dispositions of claims practical. They guard against inconsistent decisionmaking within the classes that they cover. Nevertheless, because every rule is either over or underinclusive, every rule produces unintended and often unjust results. But those results are tolerated when the aggregate effects of the rule are beneficial; when the aggregate results of a rule are not beneficial, the rule should be abolished.

It is difficult for the SSA to complain of inconsistent decisionmaking by administrative law judges and yet fail to promulgate corrective rules. If ALJ decisions are heavily inconsistent, then large numbers of them are apparently wrong.

There are two basic ways to test the accuracy of ALJ decisions. First, compare the decisions with the outcome of similar facts under a set of rules. But to admit the validity of such a test

168 Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823, 828 (1980).

would be to accept the superiority of using rules in the first instance. Second, subject the decisions to review by others. But the fact that the others would have decided differently does not necessarily indicate that the ALJs were wrong. Indeed, if the SSA can conclude that administrative law judges inconsistently decide similar cases, the SSA may be able to reduce the issues to written form and provide for the resolution of those issues by rule. In short, the very ability of the SSA to identify inconsistencies in ALJ decisionmaking suggests that those inconsistencies could be reduced through increased rulemaking. Discovery of inconsistencies at least indicates that the SSA has identified variables for testing decisional consistency, an identification that suggests the potential use of those variables for further rule or standard making, even if the SSA has not yet determined how those variables should be weighted. The only exception to this analysis would arise when ALJ inconsistencies were uncovered by a monitoring panel's reevaluation of fact-specific ALJ decisions. It is in this circumstance that the SSA has broken new ground in employing managerial tools other than rulemaking to reduce decisional inconsistencies.

(f) Managerial Tools Other Than Rulemaking.—Agencies should employ rulemaking to reduce significant and identifiable decisional inconsistencies as much as possible. Nevertheless, rulemaking may not be a complete answer to decisional inconsistencies by ALJs. Although some inconsistencies can be identified by testing ALJ decisions against sets of identified input variables, other inconsistencies can perhaps be uncovered only as a result of careful review by a monitoring panel. Such monitoring might indeed identify ALJs who are unduly prone to positive or negative errors, but, because of the fact-specific nature of each case, their performance is not amenable to correction by rule. In all circumstances in which ALJs are highly prone to a type of error not correctable by rule, the SSA might attempt to impose boundaries on ALJ discretion by establishing quotas for positive decisions, thus forcing ALJs to rank their grant decisions on a scale of relative merit.

Objections to the use of such techniques could be made—and have been made—on the ground that the SSA is thereby interfering with the decisional freedom of the ALJs and impairing the rights of claimants to an impartial tribunal. But such objections need to be assessed in a manner similar to the way that the working of rules is assessed. Rules interfere with the decisional free-

dom of ALJs, and sometimes compel them to reach certain results. Because rules resolve generic issues, however, they are not perceived as affecting the fairness of any particular proceeding. The impartiality to which a claimant is entitled is a disinterested determination of the facts and the application of the governing rules to those facts. This impartiality is not impaired when the administering authority issues rules designed to dispose of common issues in the cases. The tradeoff of some unjust results in order to achieve a higher standard of justice in aggregate results, a tradeoff which underlies all rules, is the standard by which the SSA's use of managerial tools should be judged. Mashaw's analysis shows that social welfare can be enhanced when the SSA's use of supervisory techniques reduces marginal false positives, even at the expense of producing some false negatives. Within the limits to which his analysis applies, false negatives can be tolerated when the aggregate effects of the techniques are beneficial.[169]

For reasons explicated above, rules (together with their close relatives, standards and guides)[170] provide the most obvious ways to reduce inconsistency in decisionmaking. Yet it is possible that the SSA could rationally conclude that some ALJs are likely to be overly disposed towards false positives, even though the false positives could not be identified in advance. Reversal rates or sampling techniques may reveal an above average propensity to decide for claimants which could provide the SSA with grounds for monitoring or increased Appeals Council review designed to reduce the rate of false positives. Because neither monitoring nor the targeting of particular ALJs for Appeals Council review is directed at results in particular cases, it cannot be objectionable on the grounds of particularized unfairness.

The preceding discussion does suggest that rulemaking is a presumptively better tool for reducing decisional inconsistency

169 The unintended, individual injustice produced by the SSA's efforts to reduce false positives is no different in kind from the unjust result in a particular case which is produced by the application of a rule designed for the generality of cases; and the capacity for rules to produce unintended injustice has long been recognized and accepted as a necessary evil. Society does not abandon rules because they work injustice in particular cases. Rather, rules are drafted to minimize their capacity to produce unjust results. *See, e.g.*, American Hosp. Ass'n v. NLRB, 899 F.2d 651, 659 (7th Cir. 1990). If the SSA's actions are directed at minimizing those errors which impose the highest social costs even at the expense of producing some unintended errors, then it is hard to criticize the SSA's actions, so described, without also criticizing the use of rules by courts and administrators.

170 *See* K.C. DAVIS, DISCRETIONARY JUSTICE 59 (1969).

than other tools. It suggests that when inconsistent decisionmaking is identified, rulemaking can often be expanded to provide more assistance to decisionmakers. And it suggests that residual categories reserved for personalized decision without guidance from rules be justified—that the SSA articulate the reasons why rules cannot be drafted which will produce correct results in the residual category.[171]

D. The Contribution of History and Function to the Resolution of Administrative Law Issues

The role for the alternative administrative structure examined here is largely defined by its functions. Agencies which handle very large caseloads naturally evolve towards this form. This alternative structure, however, comes in a variety of subspecies. OSHA, which must enforce its rules through an adjudicatory tribunal (OSHRC) made independent by statute, lacks the authority for employing management techniques to oversee adjudicative behavior possessed by the SSA over the ALJs and the Appeals Council. This difference, however, is largely a result of history. In its original design, it was the Secretary who was given full responsibility for implementing the programs assigned to the SSA—a model of delegation which resembled Congressional delegation to the traditional regulatory agencies. It was pursuant to administrative delegation that the ALJs and the Appeals Council have taken over full responsibility for adjudication.

Despite the long-standing presence of the alternative structure in the administration of numerous programs, that structure still possesses the capacity to obscure or distort the resolution of issues which would be recognized as familiar in other contexts. The issues of ALJ independence which have arisen in the Social Security Administration, for example, need to be evaluated against the recognized agency responsibility for policy making. The boundaries between the authority of the SSA and the ALJs ought largely

171 There may very well be an irreducible minimum class of cases where personalized decisionmaking is superior to disposition through rules; this is surely true where rules cannot capture the unique and material facts of a particular case; it is also true when the particular configuration of facts in the cases could not have been anticipated in advance. But present experience indicates that at its current level, personalized decisionmaking produces substantial inconsistencies. Whenever it is possible to determine that personalized decisionmaking produces substantial inconsistencies, the criteria by which those inconsistencies are found must have been reduced to writing. That, in turn, indicates that rules are potentially available to reduce that inconsistency.

to follow the policy/fact-finding distinction basic to all administrative law, but the courts have occasionally been misled as to the extent of the SSA's proper authority as a result of the apparent separation of the adjudicatory mechanism from the SSA.

VIII. THE ANALOGIES TO CONSTITUTIONAL THEORY

The same disputes which gave rise to the alternatively-structured agencies—disputes involving the relation between the policy arm of administration and the adjudicatory arm—bear a resemblance, albeit an inexact one, to the debates about the relation between the President and the independent agencies.[172] The arguments favoring a broad construction of the authority of the policymaking arm of administration echo the arguments for an expansive construction of presidential power vis-a-vis other parts of administration, especially the independent agencies. These arguments emphasize the agency head's statutory responsibility for administration (just as in the other debate the President's constitutional authority is stressed) and the need for policy consistency and of ultimate accountability to a politically responsible officer,[173] since in most of the alternative structures the enforcement or administrative arm lies in an executive department.

The arguments for respecting a broadly conceived independence of the adjudicating tribunals from intrusions by the administrative heads echo the arguments made on behalf of a legitimate

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172 *See, e.g.*, Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After* Bowsher v. Synar, 55 GEO. WASH. L. REV. 441 (1987).

173 A relatively strong view of presidential responsibility underlies the Supreme Court's opinion in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In that case, the Court restated, in stronger terms than it had formerly employed, the obligation of the courts to defer to agency legal interpretations. Unless the plain language of the statute or its clear legislative history provide otherwise, agency interpretations—including interpretations embodied in widely-applicable regulations—are to be followed. *Cf.* Gray v. Powell, 314 U.S. 402 (1941) (an agency's decisions about how the law applies to particular cases must be respected by the courts). This obligation to follow the agencies' interpretations has been partially justified upon the theory of representative government: by erecting the administrative interpretation as superior to that of the courts, interpretative responsibility has been placed in an executive branch which, because it is ultimately controlled by the President, is accountable to the electorate.

Professor Peter Strauss, however, has suggested another plausible explanation for *Chevron* and one less rooted in political theory: the heavy volume of agency decisions coming before the courts for review has forced a retrenchment of the judicial role, one more consistent with the limited resources available for judicial review of agency action. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095, 1118-22 (1987).

diffusion of authority within the executive branch.[174] These arguments assert that because the administrative head can exert effective control over policy through conventional rulemaking, the administrative head need not resort to managerial controls (as in the Social Security System) or to policy statements (as in OSHA). The breathing room thereby given to the adjudicating tribunals fosters the morale of the adjudicators, enhances the quality of decisionmaking, and increases the appearance of fairness.

A second, and highly formal, line of argument on behalf of a broadly conceived autonomy for the adjudicating tribunals is couched in delegation rhetoric. These arguments assert that the delegations to the adjudicating tribunals effectively constrain the powers of the administrative head. One version of that argument, for example, asserts that when the Secretary of Labor issues safety and health regulations which are ambiguous or vague, he may be taken as delegating the interpretation of his regulations to OSHRC, just as Congress is taken to delegate the interpretation of its vague or ambiguous statutes to those who administer them.[175] In a slightly more complex argument, the Secretary of Health and Human Services could be viewed as delegating decisionmaking to the ALJs and the Appeals Council. The consequence of that delegation—the argument runs—is that the Secretary must be content with their decisions, and cannot attempt to influence their method of work, other than to issue substantive regulations to which both the administrative law judges and the

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174 The position that the constitutional scheme tolerates a limited diffusion of executive authority appears to be in the ascendancy. Those supporting such a position point to long-standing practices in which the independent agencies—like the Federal Trade Commission—take action to enforce the laws relatively independently from the views of the incumbent administration. Moreover, the compatibility of the independence of the independent agencies with the constitutional scheme was examined and upheld in Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), and has been repeatedly reaffirmed. Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654, 685-89 (1988); Bowsher v. Synar, 478 U.S. 714, 724-25 & n.4 (1986). The most articulate exponent of this view is Professor Peter Strauss of Columbia University. *See* Strauss, *Formal and Functional Approaches to Separation of Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Strauss, *supra* note 54.

175 In Bowsher v. Synar, 478 U.S. 714 (1986), INS v. Chadha, 462 U.S. 919 (1983), and Buckley v. Valeo, 424 U.S. 1 (1976), the Court refused to let Congress control the manner in which a statutory enactment was administered. The Court ruled that congressional enactment of a statute was a delegation to the administering authorities in the executive branch to develop whatever policies were necessary or appropriate to make the statute operational. Congress could influence administration only by enacting new legislation modifying the provisions of the original statute.

Appeals Council must defer. Again, the argument has been made that the delegation by the Secretary of Health and Human Services of authority to the Appeals Council to review ALJ decisions which are not based upon substantial evidence is an implied delegation of final decisionmaking authority to the ALJs whenever their decisions are based upon substantial evidence.[176]

Analogies, however, are often as misleading as they are instructive. Both the debates over decisional authority in the nontraditionally structured agencies and the grand debates over the structure of the constitutional executive raise issues involving the degree of centralization or diffusion of authority, and some of the arguments in each debate have counterparts in the other. The differences, however, are vastly greater than the resemblances, if only because the consequences of their judicial resolution are so different: Congress tomorrow can change the decisional structure of OSHA, the SSA, the Veterans Administration, and the other agencies discussed here, whereas the judicial resolution of the constitutional debates will possess a permanency difficult to overcome. Moreover, the disputes over allocations of authority in the nontraditionally structured agencies are not primarily concerned with checks and balances as a protection for democratic rule; rather, they are primarily concerned with the extent to which the need for fair adjudication constrains the ability of the administrative head to exert control over substantive policy and program administration. These issues, for reasons which I have developed above, are the traditional concerns of administrative law and are best addressed in light of the history of administrative procedural reform, as I have tried to do here.

CONCLUSION

In the structural paradigm examined in this Article, adjudication takes place at the administrative level before an official or panel which is not subject to direct review by the authority charged with policy-making. While structures of this type are not new, until recently they generally have not been examined by scholars as part of the administrative-law mainstream, a mainstream whose study has been dominated by the model of the independent regulatory agencies.

176 That argument, however, has finally been put to rest by the courts. *See supra* note 165 and accompanying text.

The alternative administrative structure examined here is especially useful in those contexts where, because of a high caseload, adjudication is not an effective vehicle for responsible officials to exercise control over policies. These contexts include the administration of mass-benefit programs, such as welfare and disability. They also include enforcement programs where there is a potential for a high-volume caseload. The traditional administrative structure—which is premised upon the format of an agency bringing enforcement actions in which the final adjudicating authority is the agency head—best fits a low caseload where many of the cases raise significant policy issues in a fact-specific context. That is a context in which policy formulation can best take place in the adjudication, and where, because of the major role played by adjudication in policy formulation, the presence of the agency head as the final adjudicating authority is essentially mandated.

The heads of the traditionally structured agencies have always controlled policy through their power to review ALJ determinations. Indeed, ALJ powers have extended only to the determination of evidentiary facts. Awareness of the always limited role of ALJs is a key to unraveling many of the current disputes arising in the context of nontraditionally structured administration about the respective powers of the enforcement or administering authorities on one hand and of the adjudicating authorities on the other. The analysis contained in this Article supports the view that the policy making body may, in general, exercise its authority through management techniques and interpretations, so long as those management techniques and interpretations are geared to promote generalized policies and not the disposition of particular cases.

I have argued that independent adjudication is neither new nor unrelated to the familiar model of administration represented by the traditional regulatory agency. Independent adjudication is appropriate when the resolution of significant policy issues cannot for practical reasons be made in an adjudicatory setting or is best made elsewhere. Above all, the size of an agency's caseload will affect the choice of agency organization; the larger the caseload, the more likely it is that independent adjudication will fit the administrative task. Independent adjudication thus should be seen at one pole of an organizational spectrum, the opposite pole of which is the traditional regulatory model. Between these opposite types stand the various hybrids involving agencies which exert discretionary review of ALJ decisions, those employing intermedi-

ate review boards, and those which employ significant amounts of rulemaking in administration but in which the agency head nevertheless retains at least a latent power to review individual adjudications. These variations are each identifiable as organizational types, but they differ from their neighbor only by marginal differences in the degree to which policy is shaped in adjudications. This overall vision of agency organizational structures places independent adjudication (as well as the other varieties of administration) in a coherent conceptual framework conducive to potentially rich and rewarding analyses of its similarities to, and above all, its differences from, the traditional regulatory agency model.